

No. 92-97-CFX Title: Northwest Airlines, Inc., et al., Petitioners
Status: GRANTED v.
County of Kent, Michigan, et al.

Docketed: Court: United States Court of Appeals for
July 13, 1992 the Sixth Circuit

Counsel for petitioner: Smith Jr., Walter A.

Counsel for respondent: Hunting Jr., W. Fred, Allard, Mark S.

Entry	Date	Note	Proceedings and Orders
1	Jul 13 1992	G	Petition for writ of certiorari filed.
2	Aug 12 1992		Brief of respondents County of Kent, Michigan, et al. in opposition filed.
3	Aug 19 1992		DISTRIBUTED. September 28, 1992
4	Aug 20 1992	X	Reply brief of petitioner filed.
5	Oct 5 1992	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
7	May 18 1993		Brief amicus curiae of United States filed.
6	May 19 1993		REDISTRIBUTED. June 4, 1993
8	May 21 1993	X	Supplemental brief of petitioner filed.
10	Jun 7 1993		Petition GRANTED. Justice Blackmun OUT. *****
12	Jul 6 1993		Order extending time to file brief of petitioner on the merits until August 5, 1993.
17	Aug 4 1993		Brief amicus curiae of Air Transport Association of America filed.
13	Aug 5 1993		Joint appendix filed.
14	Aug 5 1993		Brief of petitioners Northwest Airlines, Inc., et al filed.
15	Aug 5 1993		Brief amicus curiae of Thrifty Rent-A-Car System, Inc. filed.
16	Aug 5 1993		Brief amicus curiae of American Trucking Association, Inc. filed.
19	Aug 9 1993		Order extending time to file brief of respondent on the merits until September 22, 1993.
20	Aug 20 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Aug 27 1993		Opposition of petitioners to motion of the Solicitor General for leave to participate in oral filed.
21	Sep 1 1993		Record filed.
		*	Record proceedings U.S. Court of Appeals, Sixth Circuit and U.S. District Court, W. Dist. Michigan (2 BOXES)
23	Sep 2 1993		Reply of Solicitor General in support of Motion for leave to participate in oral argument as amicus curiae.
24	Sep 10 1993		Reply of respondents Kent County Board of Aeronautics, et al. in support of motion of the Solicitor General for leave to participate in oral argument as amicus curiae.
25	Sep 22 1993		Brief of respondents County of Kent, Michigan, et al. filed.
26	Sep 22 1993		Brief amicus curiae of Aircraft Owners and Pilots Association filed.
27	Sep 22 1993		Brief amicus curiae of Airports Council International-North America filed.

No. 92-97-CFX			
Entry	Date	Note	Proceedings and Orders
28	Sep 22 1993		Brief amicus curiae of American Association of Airport Executives filed.
29	Sep 22 1993		Brief amicus curiae of City of Los Angeles filed.
30	Sep 22 1993		Brief amici curiae of National Business Aircraft Association, Inc., et al. filed.
31	Sep 22 1993		Brief amici curiae of U.S. Conference of Mayors, et al. filed.
32	Sep 22 1993		Brief amicus curiae of United States filed.
34	Sep 22 1993		Brief amici curiae of New Hampshire, et al. filed.
33	Sep 24 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Opinion per curiam. Justice Blackmun OUT.
35	Oct 6 1993		CIRCULATED.
36	Oct 14 1993		SET FOR ARGUMENT MONDAY, NOVEMBER 29, 1993. (2ND CASE).
37	Oct 22 1993	X	Reply brief of petitioners filed.
38	Nov 29 1993		ARGUED.

92-97

No. 92-

Supreme Court, U.S.
FILED

JUL 13 1992

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC.,
USAIR, INC., AMERICAN AIRLINES, INC., and UNITED
AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Commerce Clause and the federal aviation laws permit the Nation's airports to assess user fees on airlines and passengers that are far in excess of the airports' own costs, that charge the airlines substantially more than their fair share of those costs, and that deliberately discriminate against interstate airlines in favor of local aviation.

2. Whether the Commerce Clause is automatically rendered inapplicable to an area of commerce whenever the Congress takes any action at all to regulate that area.

PARTIES TO THE PROCEEDINGS

Petitioners Northwest Airlines, Inc., Simmons Airlines, Inc., COMAIR, Inc., Midway Airlines (1987), Inc., USAir, Inc., American Airlines, Inc., and United Airlines, Inc. were plaintiffs in the District Court and appellants in the Court of Appeals for the Sixth Circuit.¹ The County of Kent, Michigan, the Kent County Board of Aeronautics, and the Kent County Department of Aeronautics were defendants in the District Court and appellees in the Court of Appeals. The Airport Operators Council International was an *amicus curiae* in the Court of Appeals.

Petitioner Northwest Airlines, Inc. states that its parent companies are NWA, Inc. and Wings Holdings, Inc., and that it has no nonwholly owned subsidiaries.

Petitioner Simmons Airlines, Inc. states that its parent companies are AMR Eagle, Inc. and AMR Corporation, and that it has no nonwholly owned subsidiaries.

Petitioner COMAIR, Inc. states that its parent company is COMAIR Holdings Inc., and that it has no nonwholly owned subsidiaries.

Petitioner Midway Airlines (1987), Inc. states that its parent company is Midway Airlines, Inc., and that it has no nonwholly owned subsidiaries.

Petitioner USAir, Inc. states that its parent company is USAir Group, Inc., and that its subsidiaries are Pacific Southwest Airmotive, USAM Corp. and USAir Fuel Corporation.

Petitioner American Airlines, Inc. states that its parent company is AMR Corporation, and that DFW Terminal Corporation is a nonwholly owned subsidiary. All

¹ USAir, Inc. petitions both on behalf of itself and as the successor to Piedmont Aviation, Inc., which was also a plaintiff in the District Court.

other subsidiaries are either wholly owned by American Airlines, Inc. or jointly owned with AMR Corporation.

Petitioner United Airlines, Inc. states that its parent company is UAL Corporation, and that it has no nonwholly owned subsidiaries.

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IN THE
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OCTOBER TERM, 1992

No. 92-

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
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USAIR, INC., AMERICAN AIRLINES, INC., and UNITED
AIRLINES, INC.,

v. *Petitioners,*

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
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PETITION FOR A WRIT OF CERTIORARI

Northwest Airlines, Inc., Simmons Airlines, Inc.,
COMAIR, Inc., Midway Airlines (1987), Inc., USAir,
Inc., American Airlines, Inc., and United Airlines, Inc.,
petition this Court for a writ of certiorari to review the
judgment of the Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The three separate opinions of the divided panel of the
Court of Appeals for the Sixth Circuit (Judges Kennedy,
Nelson, and Contie) are reported at 955 F.2d 1054 and
are reprinted in the Appendix to this petition ("App.")
at 1a. The opinion of Chief Judge Merritt dissenting

from the denial of *en banc* rehearing is reported at 955 F.2d 1066 and is reprinted at App. 62a. The opinion of the District Court (Judge Bell) granting judgment to respondents is reported at 738 F. Supp. 1112 and is reprinted at App. 23a. The opinions of the District Court denying petitioners' motions for summary judgment and granting partial summary judgment to respondents are unreported and are reprinted at App. 41a, 47a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 3, 1992. That court's order denying a timely filed petition for rehearing and suggestion for rehearing *en banc* was entered on April 16, 1992. App. 60a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in pertinent part that "The Congress shall have Power . . . to regulate Commerce . . . among the several States"

Section 7(a) of the Anti-Head Tax Act of 1973, Pub. L. No. 93-44, 87 Stat. 90, 49 U.S.C. § 1513 (as amended by Pub. L. No. 97-248, tit. V, § 532, 96 Stat. 701 (1982)) provides, in pertinent part:

(a) *Prohibition; exemption.* No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom;

(b) *Permissible State taxes and fees.* [N]othing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of

taxes other than those enumerated in subsection (a) of this section . . . ; and nothing in this section shall prohibit a state (or political subdivision thereof) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Section 2210 of Title 49, U.S.C. provides, in pertinent part:

(a) *Sponsorship*

As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination . . . ;

(9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible . . . ;

(12) all revenues generated by the airport, if it is a public airport . . . will be expended for the capital or operating costs of the airport

STATEMENT OF THE CASE

This case presents two important questions. The first concerns the "reasonableness" of user fees assessed by the Nation's airports on airlines and their passengers. More specifically, this case asks the Court to decide whether airport user fees that consistently generate huge surpluses far in excess of the airports' own costs, that charge the airlines substantially more than their fair share of those costs, and that deliberately discriminate against interstate airlines in favor of local aviation, are

"reasonable" within the meaning of the federal Anti-Head Tax Act ("AHTA"), 49 U.S.C. § 1513. A unanimous Seventh Circuit (Judges Posner, Flaum, and Coffey) has already held that such fees are patently unreasonable. See *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984). In so holding, the Seventh Circuit relied on the Commerce Clause standard for reasonableness established by this Court in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

Yet in this case, a divided panel of the Sixth Circuit upheld airport fees virtually identical to those disapproved by the Seventh Circuit, and did so notwithstanding that the Sixth Circuit agreed that the AHTA's "reasonableness" requirement should be interpreted according to this Court's *Evansville* standard. The result is that, as the Chief Judge of the Sixth Circuit indicated in his dissent from denial of *en banc* rehearing, the Circuits are now split over an issue of great consequence to the millions of members of the traveling public, to the hundreds of airports in this country, and to the surviving members of the ailing airline industry.

The second question presented by this case is potentially of even greater importance: whether the Commerce Clause of the U.S. Constitution is rendered inapplicable to all State regulation—no matter how burdensome upon or discriminatory against interstate commerce—whenever Congress has taken at least some regulatory action in the area. That is the holding of the Sixth Circuit in this case. It is not only in conflict with other Circuits addressing the issue, but it is directly contrary to the controlling precedents of this Court. If this view of the Constitution were allowed to stand, it would not only effectively eviscerate the Commerce Clause, but would also produce numerous anomalous results Congress could not have intended. For all these reasons, further explained below, certiorari should be granted.

A. The Airport's User Fees

The Kent County International Airport, located near Grand Rapids, Michigan ("the Airport"), assesses fees on the following primary users of that Airport: (1) the commercial airlines that serve Grand Rapids ("the Airlines"); (2) local general aviation (primarily corporate and privately owned aircraft); (3) the concessionaires (rental car agencies, parking lot operators, etc.); and (4) the Airlines' passengers. The Airport assesses fees on the first three groups directly, and on the fourth group, the Airlines' passengers, indirectly. Those fees are assessed as follows.

First, the Airport determines its own costs associated with providing benefits to each of the first three groups (Airlines, local aviation, and concessions). It does so, however, by assuming that only the Airlines and local aviation benefit in any way from the Airport's airside activities (*i.e.*, from costs associated with runways, landing operations, etc.). App. 27a. It makes this assumption even though the Airport concessions are entirely dependent on the commercial air operations for the creation of their customer flow. Indeed, the Airport makes this assumption even though there obviously would be no customer flow to the concessions at all were it not for the substantial airside activities.

Having made this assumption, the Airport then charges nearly all the costs of the airside activities (as well as the costs of the passenger terminal) to the Airlines, including the share of those costs that should be assigned to the concessions. Next, the Airport charges local aviation only 20% of the costs that the Airport's own allocation method shows are attributable to local aviation. That is to say, once the Airport determines the amount of its costs it believes are fairly allocable to the Airlines and to local aviation, it assesses the Airlines 100% of their allocated share, but assesses local aviation only 20% of its allocated share. Finally, having thus overcharged

the Airlines for their fair share of the airside activities (because the Airlines are also charged for the concessions' share of those activities), and having also deliberately undercharged local aviation for its fair share, the Airport finishes by charging the concessions a fee based on a flat percentage (10%) of their gross sales to customers—a fee that is necessarily passed on to the Airlines' passengers because those passengers are the concessions' customers. See App. 27a-29a.

The Airport's fee methodology produces three significant anomalies:

- first, year in and year out the methodology requires the Airlines and their passengers to pay user fees vastly in excess of the Airport's actual costs;
- second, it requires the Airlines to pay for virtually all the costs of airside activities and more than three-quarters of the costs of the passenger terminal, even though the concessions are directly benefitted by the services and facilities that generate those costs; and
- third, the methodology specifically and deliberately discriminates against the Airlines in favor of local aviation.

These anomalies were not only predictable, but inevitable, given a methodology that essentially attempts to recover the Airport's costs at least twice over—once by charging nearly all the airside activity and passenger-terminal costs to the Airlines (including the concessions' share of those costs) and a second time by charging a 10% sales-volume fee that is passed on to the Airlines' passengers. Taken together, these anomalies have produced multi-million-dollar cumulated surpluses for the Airport—surpluses far in excess of the amounts the Airport could ever need, even taking into account all expenses, all debt service, and all possible further capital expenditures and improvements.

B. The Statutory and Constitutional Challenges to the Fees

The commercial airlines that serve the Grand Rapids Airport challenged the described fee methodology in federal district court in Michigan, alleging that it violates both federal statutory law and the Commerce Clause.¹ The Airlines relied primarily on the Anti-Head Tax Act, 49 U.S.C. § 1513, which prohibits airports from imposing any “fee, . . . directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce,” other than “reasonable” fees imposed on “aircraft operators for the use of airport facilities.” 49 U.S.C. § 1513(a), (b) (1988). The Airlines also argued that the Airport's methodology places an unreasonable burden on interstate air travel and impermissibly discriminates against interstate air travel in favor of local, intrastate travel—all in violation of the Commerce Clause.

In support of these arguments, the Airlines relied principally on three authorities: (1) this Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, *supra*; (2) the AHTA and its legislative history; and (3) the Seventh Circuit's decision in *Indianapolis Airport Authority v. American Airlines, Inc.*, *supra*.

1. *Evansville*

In *Evansville*, this Court held that the Commerce Clause forbids airports from levying fees on airport users² unless the fees are (1) “based on some fair approximation of use or privilege for use”; (2) not dis-

¹ Jurisdiction in the trial court was conferred by 28 U.S.C. § 1331. The Airlines also challenged the methodology under Michigan law, a challenge that is not before this Court.

² The Court deemed it irrelevant whether such fees are levied on passengers directly, or indirectly through charges on airlines. 405 U.S. at 714-15.

criminatory as between interstate and intrastate users; and (3) not "excessive in relation to costs incurred by the taxing authorities." 405 U.S. at 716-20. Airport fees are considered excessive under the third test if they "would do more than meet . . . past, as well as current, deficits." *Id.* at 720. The Court found this third requirement consistent with Congress' intention to allow airports "to levy charges designed to help defray the costs of airport construction and maintenance," and thereby "'make the airport as self-sustaining as possible.'" *Id.* at 721 (quoting Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219, 49 U.S.C. § 1718(8) (current version at 49 U.S.C. § 2210(a)(9))). Finding that the passenger head taxes involved in *Evansville* satisfied all three of these tests, the Court approved them.

2. The AHTA

Reacting to the *Evansville* decision, Congress in 1973 enacted the AHTA, which supplemented *Evansville* with an even *stricter* standard that prohibits all fees (whether or not permissible under *Evansville*) except certain fees exempted from statutory regulation. Specifically, for purposes of this case the AHTA outlawed all passenger head taxes, whether direct or indirect, except "reasonable" fees imposed on "aircraft operators for the use of airport facilities." The history of this enactment³ makes clear that Congress intended to authorize *only* fees that were to be used for aviation-related purposes and were necessary to make the airports self-sustaining, and that any other fees would produce unacceptable "financial windfalls" for those airports. See S. Rep. No. 93-12, 93rd Cong., 1st Sess., reprinted in 1973 USCCAN 1434, 1446-51.

³ For a discussion of the legislative history of the AHTA, see *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 8-10 (1983).

3. Indianapolis

Following enactment of the AHTA, the Seventh Circuit in *Indianapolis* reviewed fees almost identical to those presented here. There, as here, the airport had allocated none of the costs of air activities to concessions; there, as here, the airport assessed sales-volume fees on concessions that were largely passed on to the airlines' customers; there, as here, the airlines were assessed fees designed to recover all costs allocated to them, while general aviation was assessed fees designed to recover significantly less than its allocated costs; and there, as here, the airport's rates and fees yielded the airport income substantially in excess of its total costs. See 733 F.2d at 1265, 1271.

For two reasons, the Seventh Circuit panel unanimously concluded that the resulting fees assessed on the airlines were invalid. Judge Posner, writing for himself and Judge Coffey, concluded that the fees were not "reasonable" within the meaning of the AHTA because:

When concession rentals . . . that are more than three times the cost that [the airport] itself allocates to the concessions are added to the airline user fees . . . the result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers, and is therefore unreasonable . . .

Id. at 1268 (emphasis supplied).

Judges Posner and Coffey furthermore determined that, as a practical matter, the airport's refusal to consider concession surpluses when assessing appropriate airline fees would allow an airport to tax passengers indirectly, and thus evade the requirements of the AHTA. *Id.* at 1268-60. Thus, Judge Posner wrote, if the total fees assessed on airlines and their passengers (whether directly or indirectly) are far in excess of the airport's costs, the inevitable result will be reduced passenger travel or reduced ticket prices (and thus reduced airline

revenues). *Id.* at 1268. Finally, the majority found the airport's fees necessarily unreasonable because of their discriminatory treatment of interstate airlines vis-a-vis local aviation. *Id.* at 1271.

In a separate opinion, Judge Flaum likewise found the airport's airline fees unreasonable, but for a different reason—because the airport charged the whole of the costs of the airside activities to the airlines, and none to the concessions.⁴ Judge Flaum held such fees unreasonable because:

The dependence of the nonaeronautical users [*i.e.*, the concessions] on the airlines to produce customers means that those users receive a substantial benefit from the airlines. *The costs of producing that benefit, however, are borne entirely by the airlines.*

Id. at 1276 (emphasis supplied). Accordingly, a unanimous Seventh Circuit invalidated the fees.

C. The Divided Sixth Circuit's Approval of the Fees

After a bench trial, the District Court in this case upheld nearly identical fees, even though it was "troubled by such large surpluses generated by the Airport." App. 39a.⁵ A divided panel of the Sixth Circuit affirmed, through three separate opinions that together expressly rejected every ground upon which the *Indianapolis* court relied.

⁴ Judge Flaum declined to address the AHTA issue, holding that the fees were unreasonable under state law, which likewise imposed a "reasonableness" requirement on airport fees. *Id.* at 1274. However, he did not find that the federal reasonableness requirement should be interpreted differently, preferring not to reach that issue. *Id.* at 1274 n.5. Nevertheless, he did observe that the AHTA prohibits excessive overall airport revenues. *Id.*

⁵ The District Court struck down one aspect of the Airport's fees (overnight aircraft parking fees), but this holding was not appealed by the Airport and is therefore not presented for review in this Court.

Thus, first, the panel (through Judge Kennedy's lead opinion) rejected the holding of the *Indianapolis* majority that fees which are out of all proportion to airport costs—and which therefore produce substantial surpluses at the expense of the traveling public—are necessarily "unreasonable" under the AHTA. Instead, the panel reasoned that because concession fees "are not within the scope of the AHTA," the huge surpluses are irrelevant to whether the fees charged to the Airlines are unreasonable. App. 9a-10a.

Second, the panel rejected Judge Flaum's view that fees such as those involved here are unreasonable because they allocate no share of the Airport's air-activity costs to concessions, even though the concessions reap substantial benefits from those activities. App. 11a-12a. The panel's only answer to Judge Flaum's holding was that the Airlines had not proved that 100% of the *terminal building* common areas were charged to the Airlines. The panel thus completely missed the Airlines' and Judge Flaum's point, which is that *none* of the airside costs are allocated to the concessions, with the necessary result that the Airlines' fair share of those costs is overstated.

Finally, Judges Contie and Nelson rejected the *Indianapolis* court's holding that the fees in this case unlawfully discriminate against the Airlines in favor of local aviation. These two Judges found the discrimination "reasonable" and so upheld it. App. 18a-20a. Judge Kennedy dissented on this point, as she agreed with the *Indianapolis* court that "[t]his is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act." App. 13a (quoting 733 F.2d at 1271).

The panel struck down only one portion of the challenged fees: Judges Kennedy and Contie agreed with the Airlines that it was unreasonable under the AHTA to allocate all Airport costs of crash, fire, and rescue ("CFR") services to the Airlines, as those costs also produce a "substantial benefit" to general aviation and the

concessions. App. 13a-14a.⁶ Judge Nelson dissented on this point. App. 21a-22a. Nevertheless, although a majority of the panel assessed the reasonableness of the CFR cost allocation according to the benefits actually received by the various airport users, it inexplicably refused to apply that same standard to the allocation of other costs, *i.e.*, it refused to acknowledge that concessions received substantial benefits from the airside activities that created their customer flow, but were allocated none of the costs of those activities.

Having thus rejected the Airlines' contentions under the AHTA, the court then refused to even *consider* their contentions under the Commerce Clause. App. 16a-17a. Notwithstanding that this Court entertained precisely such a challenge in *Evansville*, the Sixth Circuit held that such scrutiny was no longer available once Congress had enacted the AHTA. Specifically, the court held that Commerce Clause review is available only if "Congress had taken no other action to regulate the area." App. 16a. In so holding, the court ignored both *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982)—which holds that state legislation remains subject to challenge under the Commerce Clause unless Congress has "expressly stated" its desire to immunize that legislation—as well as the fact that Congress enacted the AHTA to set a *stricter* standard than that applied under the Commerce Clause, not to *prevent* application of the Clause as in *Evansville*.

The panel denied rehearing and the Sixth Circuit denied rehearing *en banc*. App. 60a. However, Chief Judge Merritt dissented from the denial of rehearing *en banc*, explicitly noting the need for review in this Court. Recognizing that the panel's opinion created a "direct conflict with the Seventh Circuit" on "an important issue," the Chief Judge stated that "[b]efore we require

⁶ Oddly, this was the only issue which the airlines in *Indianapolis* had lost; thus, the panel below succeeded in creating a split in the circuits on every issue it decided.

the Supreme Court to resolve this conflict in the circuits, we should hear the case *en banc*." App. 62a. He also stressed that the panel's holding necessarily affected "airports across the country" and therefore involved issues upon which "[t]here is a great need for uniformity." *Id.*⁷

REASONS FOR GRANTING THE WRIT

This case presents all three of the most important grounds warranting review by this Court: (1) the decision below has created a direct conflict in the Circuits; (2) the decision is in conflict with this Court's own precedents; and (3) the case plainly presents significant issues of nationwide importance. Together, these grounds present a compelling case for certiorari.

I. THE CONFLICT IN THE CIRCUITS

As noted by Chief Judge Merritt, the decision below is squarely in conflict with the Seventh Circuit's decision in *Indianapolis*. Both cases involved an identical fee-setting methodology—a methodology by which the local airports generated huge surpluses far in excess of their costs of operation, debt service, and capital expenditures—all at the expense of commercial airlines and the traveling public. The airports did so by (1) allocating none of the costs of airside activities to concessions (even though the concessions obviously benefit enormously from those activities); (2) assessing fees against the airlines and their passengers that are out of all proportion to the airlines' fair share of the airport's operating costs; (3) systematically discriminating against the interstate airlines in favor of local aviation; and (4) year in and year out

⁷ Although the Chief Judge's opinion was addressed specifically to the CFR issue (upon which the Airlines prevailed), his reasoning is equally applicable to the other issues in the case. That is because every issue faced by both the Sixth and Seventh Circuits was decided under an identical "reasonableness" standard; furthermore, all such issues are applicable to airports across the country and as to each there is a great need for uniformity.

generating fee revenues far in excess of the airports' needs to remain self-sustaining.

The Seventh Circuit said such fees are not "reasonable" under the AHTA; the Sixth Circuit in this case said they are. The conflict could not be more direct.⁸ Moreover, each of the five opinions in these two cases displays a different understanding of the AHTA reasonableness requirement.

Furthermore, the Sixth and Seventh Circuit decisions are not isolated incidents. Rather, courts have been grappling with these issues ever since *Evansville*, and no

⁸ The divided Sixth Circuit panel purported to distinguish part of its decision from the *Indianapolis* case on the ground that the airport in that case had a "locational monopoly" while the Kent County airport does not. App. 10a. This purported distinction is legally irrelevant, factually wrong, and could in no event justify the whole of the Sixth Circuit's decision. The AHTA requires fees at all airports to be reasonable, whether or not those airports happen to possess monopoly power. The *Indianapolis* court found that airport's fees to be unreasonable *not* because the airport had monopoly power, but because its fees were far in excess of its costs. 733 F.2d at 1268. The court referred to monopoly power solely as an explanation for the airport's *ability* to impose its excessive fees, not as a *prerequisite* to a finding that the fees were unreasonable. *Id.* at 1267-1269.

Moreover, the factors the *Indianapolis* court relied on to detect the presence of monopoly power—excessive surpluses and the absence of comparable alternative airports—are in fact presented in this case. *See id.* at 1267. The lack of any real alternatives is demonstrated here by the fact that the service at the airports nearest to the Kent County airport is much more limited than that at Kent County, and that travellers must incur significant additional costs to reach those airports. The existence of other airports an hour away does not destroy Kent County's monopoly; rather, as Judge Posner recognized, it merely limits it. *Id.* at 1269. Finally, and in any event, even if monopoly power helped explain the excessive fees on airlines and their passengers, this power has nothing to do with—and cannot justify—either the unreasonable allocation of costs between airlines and concessions or the blatant discrimination against the airlines in favor of local aviation.

two opinions have rested on the same grounds. For example, in *Raleigh-Durham Airport Authority v. Delta Air Lines, Inc.*, 429 F. Supp. 1069 (D.N.C. 1976), the court held that an airport may refuse to allocate costs of airside activities to concessions only if none of the airport's concession revenues are ever used to finance airside activities. On the other hand, in *City and County of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834 (D. Colo. 1989), the court held that an airport may assess fees on airlines for costs related only to their present use of *existing* facilities, but not for the construction of future facilities. Yet in *American Airlines, Inc. v. Massachusetts Port Authority*, 560 F.2d 1036 (1st Cir. 1977), the court held that an airport may validly charge airlines for facilities that are not in fact put into use. It is plain that such conflicts will continue, and multiply, until the Court gives guidance and meets the "great need for uniformity" noted by Chief Judge Merritt. App. 62a.

In addition, the conflict noted by the Chief Judge is not the only one presented by this case. In holding that the mere enactment of the AHTA foreclosed Commerce Clause review of the challenged fees, the court placed itself in direct conflict with *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992) and *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991). In both of those cases, the courts held that airport fees were permissible under the AHTA, but then also subjected those fees to Commerce Clause review.⁹ Moreover, the Sixth Circuit's broad holding that

⁹ The Sixth Circuit attempted to distinguish *Sarasota-Manatee* on the grounds that the plaintiff in that case (a concessionaire) "was not disputing a tax or regulation in an area where Congress had acted . . ." App. 17a. However, not only is this an incorrect statement of the applicable legal standard (*see infra* at 18-19), but both cases involved precisely the same issue—whether a regulation that is held to be permissible under the AHTA must nevertheless still pass muster under the Commerce Clause.

Commerce Clause review is available only when Congress has "taken no other action to regulate the area" cannot be reconciled with the holdings of other circuits. See *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d 713, 721-22 (11th Cir. 1990) (federal hazardous waste laws do not demonstrate "unmistakably clear" intent to approve otherwise invalid state regulation in the area), *modified*, 924 F.2d 1001, *cert. denied*, 111 S. Ct. 2800 (1991); *Middle South Energy, Inc. v. Arkansas Public Serv. Comm'n*, 772 F.2d 404, 414-15 (8th Cir. 1985) (federal utility regulation does not foreclose Commerce Clause review of state utility laws), *cert. denied*, 474 U.S. 1102 (1986). Thus, on both of the questions presented here—the definition of "reasonable" airport fees and the availability of Commerce Clause review for those fees—there is clear, pervasive conflict in the Circuit Courts.

II. THE CONFLICT WITH THIS COURT'S PRECEDENTS

The Sixth Circuit is not only in conflict with other Circuit Courts, it is also in direct conflict with the controlling precedents of *this* Court. Thus, first, the Sixth Circuit inexplicably failed to apply the analysis set forth in *Evansville*, even after recognizing that that precedent was controlling under the AHTA. See App. 11a. And, second, the panel completely ignored this Court's holdings that Commerce Clause review must be undertaken unless Congress "expressly states" otherwise with an "unmistakably clear" intent.

Indeed, the fees in this case plainly violate all three *Evansville* tests—they deliberately discriminate between interstate and intrastate users,¹⁰ they do not fairly ap-

¹⁰ This Court has recently re-emphasized the nearly *per se* invalidity of such discriminatory regulation. See *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014 (1992) (facially discriminatory regulation "is typically struck down without fur-

proximate each user's receipt of beneficial services, and they are plainly excessive in relation to the Airport's actual costs of the services. In the face of these three *Evansville* violations, it is difficult to understand how the Sixth Circuit could nevertheless have deemed the fees "reasonable."¹¹

ther inquiry" and "[a]t a minimum . . . invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives'" (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019, 2023-24 (1992) (applying same standard); *Wyoming v. Oklahoma*, 112 S. Ct. 789, 799-802 (1992) (same).

¹¹ The court's failure to follow *Evansville* cannot be justified by its holding that concession fees *per se* are not regulated by the AHTA. See App. 9a. The airlines have never argued—neither here nor in *Indianapolis*—that concession fees are regulated by the AHTA. Rather, they have argued that under the AHTA the fees imposed on them must be reasonable and that they are not reasonable where, as here, those fees (1) allocate all the costs of airside activities to them, and none to concessions, (2) discriminate against them in favor of local aviation, and (3) assess fees on them and their passengers far in excess of the Airport's costs. Moreover, because, as Judge Posner noted, the concession fees affect the total cost of travel, they necessarily affect the passengers' purchasing decisions and consequently the Airlines' revenues. See 733 F.2d at 1268. As this Court has recently emphasized, local aviation regulation must be measured by its *actual economic effects* on airline ticket prices, regardless whether the regulation directly regulates those prices. See *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2039-40 (1992).

Furthermore, Congress' concern over the effect of fees on the overall travel cost to the public is also demonstrated by 49 U.S.C. § 2210(a)(1), which requires that any airports receiving federal development grants "be available for public use on fair and reasonable terms and without unjust discrimination." Just as this Court in *Evansville* relied on the predecessor to § 2210 when evaluating airport fees under the Commerce Clause, it is clear that Congress intended the AHTA to be read in conjunction with § 2210. See S. Rep. No. 93-12, 93rd Cong., 1st Sess., 1973 USCCAN 1434, 1455 ("the two actions must be viewed together and . . . neither should stand alone without the other").

It is even more difficult to understand how the court, having found that the challenged fees did not violate the AHTA, could then refuse even to *consider* the merits of the Airlines' separate claim under the Commerce Clause. This constitutional claim was crucial to the Airlines' case because, even if the Sixth Circuit was right to deny the AHTA claim on the ground that that statute is inapplicable to concession fees—a point with which the Airlines strongly disagree (*see supra* n.11)—the Commerce Clause obviously *does* apply to such fees. *See, e.g., McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 241 (1980) (Commerce Clause embraces all activities having any effect on interstate commerce). Yet the Sixth Circuit, citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), held that "courts should only undertake a Commerce Clause review of a tax or regulation if Congress had taken no other action to regulate the area." App. 16a. Finding that the AHTA constituted such "action," the court determined that the Commerce Clause was rendered completely inapplicable.

The Sixth Circuit's holding is clearly *not* the law. Rather, as this Court reaffirmed in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), the principle recognized in *Merrion* applies only where Congress' "intent and policy" to sustain state legislation from attack under the Commerce Clause was "*expressly stated*" in the legislation at issue. *Id.* at 960 (emphasis supplied) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982)).

More recently, the Court reiterated that such intent *cannot be implied*, but rather Congress must "affirmatively contemplate otherwise invalid state legislation" and its "intent must be unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). *Accord, Wyoming*, 112 S. Ct. at 802 ("Congress must manifest its unambiguous intent"); *Maine v. Taylor*, 477 U.S. 131, 139 (1986) ("An unambiguous indication of congressional intent is required be-

fore a federal statute will be read to authorize otherwise invalid state legislation . . ."). In each of these cases, the Court entertained a Commerce Clause challenge despite the fact that Congress had taken "some action" to regulate the particular area of commerce, because Congress did not *expressly* indicate that it intended that action to override Commerce Clause protections.

Obviously, the AHTA does not evince any such congressional intent. Rather, far from being a situation in which Congress acted "expressly" to *approve* otherwise unconstitutional activities as *valid*, its entire purpose in the AHTA was to apply an even stricter standard than *Evansville*. Congress can hardly be thought thereby to have "expressly" approved any activity which is in fact unreasonably burdensome to interstate commerce. On the contrary, the plain language of § 1513(b)—particularly the authorization of only "reasonable" user fees—makes clear that Congress intended for the AHTA to have *no effect* on the legality of those activities exempted from regulation. As this Court has consistently held, provisions such as § 1513(b) merely limit the scope of federal pre-emption, and do not thereby manifest an intent to approve otherwise invalid legislation. *See Wyoming*, 112 S. Ct. at 802 (construing similar provision); *New England Power*, 455 U.S. at 341 (same). *See also Aloha Airlines*, 464 U.S. at 12 n.6 (intent of § 1513(b) is to limit pre-emptive scope of AHTA).¹² In sum, the decision below is in direct conflict with this Court's precedents on both of the questions presented by this case.

III. THE NATIONAL IMPORTANCE OF THIS CASE

Finally, the case is of nationwide importance with regard to both of the questions presented. Indeed, with

¹² This Court's treatment of the AHTA also confirms that that statute was not intended by Congress to preclude Commerce Clause inquiry. *See Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986) (state activity that is permitted by AHTA subjected to Commerce Clause analysis).

regard to the kind of fees imposed in this case, it is clear, as Chief Judge Merritt wrote, that the Sixth Circuit's decision will necessarily affect "airports across the country." App. 62a. And if that decision is allowed to stand—and the excessive fees at Grand Rapids proliferate—the impact on the traveling public and the airline industry will be profound. This is so for several reasons.

As this Court recently noted in *International Society for Krishna Consciousness v. Lee*, 60 U.S.L.W. 4749 (U.S. June 26, 1992), the airports in this country have in recent years become big business: they are now large "commercial establishments" that are "funded by user fees and designed to make a regulated profit." *Id.* at 4752. And, even though their purpose is "the facilitation of passenger air travel" (*id.*), their *modus operandi* (as shown by this case and the *Indianapolis* case) is to assess the highest possible fees on airlines and their passengers. It is undeniable that it is the airlines and their passengers that pay those fees inasmuch as virtually all who come to the airports do so for purposes related to air travel. See *id.* at 4750, 4752.

The pervasive impact of these fees is staggering. In 1989 alone, the total operating profit for 190 of the Nation's largest airports (which together served less than 60% of that year's passenger demand) exceeded \$1,072,000,000—virtually all funded by airlines and their passengers. See American Association of Airport Executives, *1990 Survey of Airport Rates and Charges* (aggregated surpluses for reporting airports); Federal Aviation Administration, Air Carrier Activity Information System (1989 enplanement data). In *Krishna Consciousness*, this Court referred to these profits as "regulated." 60 U.S.L.W. at 4752. But under the Sixth Circuit's decision it is hard to see how there is *any* limit on the fees and profits airports will be allowed to extract. And if the Sixth Circuit's decision is allowed to stand, it is inevitable that numerous other airports will soon follow with com-

parable fees of their own.¹³ The profits for airports will thus continue to soar, the costs to the public will continue to increase, and the burden on interstate travel—the very thing the AHTA was designed to prevent—will grow worse.¹⁴

At the same time, the increased fees to the Airlines—and the resulting inevitable loss of ticket revenue (*see Indianapolis*, 732 F.2d at 1268)—will only exacerbate the airlines' already critical financial condition. Numerous large carriers (including Eastern Airlines, Continental Air Lines, Pan American World Airways, Trans World Airlines, America West Airlines, petitioner Midway Airlines, and Braniff) are currently in bankruptcy or have recently been liquidated. And virtually all the survivors are losing money. Indeed, in 1990 and 1991, the airline industry lost a staggering \$3,921,002,000 and \$1,869,974,000 respectively, while being directly charged over \$3,407,397,000 in airport fees in 1991 alone. These fees

¹³ At the time this Court upheld the head taxes at issue in *Evansville*, there were only five or six jurisdictions with such taxes. However, during the year following that decision, some 44 jurisdictions had adopted the tax, prompting passage of the AHTA. See Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182 and S. 38 Before the House Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess., at 64-67 (1973). A similar response will doubtless occur here. In addition, the decision below sends a clear signal to localities that it is now permissible to openly discriminate between local and interstate aviation—result that Congress and the Constitution both sought to prohibit.

¹⁴ The legislative history of the AHTA makes clear that Congress forbade windfall-producing fees at airports regardless whether passengers or airlines ultimately paid those fees; for whether the passengers pay them directly, or they are "absorbed" by the airlines, or a "fare increase [has] to be implemented," in any event the "end result is to raise the cost of air travel." S. Rep. No. 93-12, 1973 USCCAN at 1451.

currently account for approximately 4.5% of the airlines' total operating costs.¹⁵

The impact of these fees is substantial, especially considering that even in the best of years the airline industry's profit margins are exceedingly slim. A margin of 2-3% is considered "good," and the airlines historically have been only half as profitable as the average company in other U.S. industries. See Air Transport Association of America, *1992 State of the U.S. Airline Industry: A Report on Recent Trends for U.S. Air Carriers* 5 (Mar. 1992). Moreover, airport fees have steadily increased at rates far above inflation, while the intensely competitive nature of the airline industry ensures that these increases cannot be recouped through ticket prices: between 1982 and 1991, airport fees rose by 76% while during the same period overall consumer prices rose by only 41% and average ticket prices by a mere 7%. *Id.* at 12, 15. In these circumstances, only a single major carrier (Southwest Airlines)—and not one of the petitioners in this case—is expected to earn a profit this year. See Stewart Toy & Seth Payne, *The Airline Mess*, Business Week 50, 51 (July 6, 1992).

The significance of this case, therefore, is that the excessive airport fees in this case have been imposed at a time when airports are thriving and airlines are failing, and when the inevitable result of such fees is to burden—if not stifle—interstate air travel. Indeed, the continued unchecked imposition of airport fees could mean the difference between solvency and insolvency for many airlines, especially if one considers the inevitable decrease

¹⁵ See Air Transport Association of America, *Air Transport 1992: The Annual Report of the U.S. Scheduled Airline Industry* 17 (June 1992) (loss figures). The figures on airport fees and total operating costs have been aggregated by the Air Transport Association based on information submitted by the airlines on Department of Transportation Form 41. Airport fees include landing fees and terminal rental fees.

in passenger demand caused by the fees.¹⁶ Moreover, the traveling public—whom Congress primarily sought to protect—must ultimately bear the brunt of these fees. In 1989 alone, over 482,860,000 trips were taken from 417 airports by passengers on the Nation's commercial airlines. On an average per-passenger basis, each of these trips contributed approximately \$3.80 to the airports' total profits. See American Association of Airport Executives, *1990 Survey of Airport Rates and Charges* (aggregated surpluses for 190 airports); Federal Aviation Administration, Air Carrier Activity Information System (1989 enplanement figures). Thus, it is clear that the airport fees presented in this case will inevitably produce the very increase in air travel costs that Congress intended to prohibit. For all these reasons, the lower courts' conflict over the lawfulness of such fees raises a question of great national importance.

Finally, the Sixth Circuit's abdication of Commerce Clause review will have profound effects not only on all future challenges to airport fees, but also on the viability of judicial review over virtually *all* areas of interstate commerce. If constitutional scrutiny exists only when "Congress ha[s] taken no other action to regulate the area," it is difficult to imagine *any* area where the Constitution would still be operative. For Congress has regulated almost *every* area of interstate commerce in some way, but only rarely does it "expressly state" its intention to approve activities that are considered unreasonably burdensome under the Commerce Clause. As this Court has emphasized, the requirement that Congress' intent be "unmistakably clear" is necessary "because of

¹⁶ It has been estimated that a mere 2% reduction in the federal airline ticket tax (which has the same economic effect as airport fees) would result in an annual increase of 6.5 million passengers and would increase the airlines' revenues by \$900 million and their net profit by \$300 million. See Air Transport Association of America, *1992 State of the U.S. Airline Industry: A Report on Recent Trends for U.S. Air Carriers* 14 (Mar. 1992).

the important role the Commerce Clause plays in protecting the free flow of interstate trade" *Maine*, 477 U.S. at 138-39. In view of the pervasiveness of federal commerce regulation, the decision below completely nullifies that "important role" and permits all manner of burdensome state regulation regardless of Congress' intent. Such a result should not obtain without this Court's review.

CONCLUSION

For all the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

**UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT**

Nos. 90-1811, 90-2117

NORTHWEST AIRLINES, INC.; SIMMONS AIRLINES, INC.;
PIEDMONT AVIATION, INC.; COMAIR, INC.; MIDWAY AIR-
LINES, INC.; USAIR, INC.; AMERICAN AIRLINES, INC.;
and UNITED AIRLINES, INC.,

Plaintiffs-Appellants,

v.

COUNTY OF KENT, MICHIGAN; THE KENT COUNTY BOARD
OF AERONAUTICS; and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Defendants-Appellees.

Argued Sept. 23, 1991

Decided Feb. 3, 1992

Douglas E. Wagner, Christopher C. Williams, Mark S. Bransdorfer (briefed), Warner, Norcross & Judd, Grand Rapids, Mich., Walter A. Smith, Jr. (argued), Hogan & Hartson, Washington, D.C., Malcolm C. Mallette (briefed), James G. McIntire, Krieg, DeVault, Alexander & Capehart, Indianapolis, Ind., for plaintiffs-appellants.

Richard A. Kay, Mark S. Allard (briefed), Varnum, Riddering, Schmidt & Howlett, W. Fred Hunting, Jr. (argued), briefed, Robert A. Buchanan, Law, Weathers & Richardson, Grand Rapids, Mich., for defendants-appellees.

Before KENNEDY and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

KENNEDY, Circuit Judge.

Northwest, Simmons, Piedmont Aviation, Comair, Midway, USAir, American and United Airlines dispute the landing fees, terminal building rental rates, carrying charges, and crash/fire/rescue charges assessed them at the Kent County International Airport serving Grand Rapids, Michigan. The Airlines also argue that surplus revenue generated by the fees charged non-airline concessions should be cross-credited to reduce the fees charged to the Airlines. For the reasons state below, we REVERSE and REMAND to the District Court to determine the proper allocation of fees between the Airlines and general aviation in regard to crash, fire and rescue costs. We AFFIRM the District Court's dismissal of the Airlines' claims under the Airport and Airway Improvement Act of 1982 and the Commerce Clause, its finding that the Airlines have no right to be cross-credited for concession revenues, the finding that the allocation of terminal rental fees between the Airlines and concessions were reasonable, and the finding that the method the airport used to assess airside operation fees for general aviation and the Airlines was reasonable.

I.

The Kent County International Airport ("Airport") is operated by the Kent County Aeronautics Board and the Kent County Department of Aeronautics ("defendants"), both departments of Kent County. The County is the owner and landlord of the Airport and its facilities. The Airport was originally financed by the issuance of general obligation bonds which were later retired through a tax levy. The Airport is a relatively small hub airport whose primary passengers consist of people with Western Michigan origins or destinations. The Airport is serviced by

Northwest, Simmons, Piedmont Aviation, Comair, Midway, USAir, American and United Airlines ("Airlines").

The accounting methodology used by the Airport views the Airport as the landlord, and all users as tenants. This accounting system, developed by James C. Buckley, is known as the Buckley or compensatory "methodology" and is widely used by airports.¹ The system is designed so that the Airlines are only charged for the land costs, physical facilities and other expenses which can be directly allocated to them. When using this system, the Airport first determines the cost basis of the land and facilities. Next, the usage of all areas is calculated and the various users are assigned rents that reflect their usage level. The costs are primarily divided among three groups: the Airlines, non-airline concessions, and general aviation.² These users enter into leases with the Airport which establishes the fees and rates to be charged.

The Airlines and the Airport negotiated and agreed on the fees to be charged through December 31, 1986. In 1986, a new rate study resulted in increased fees and the Airlines and Airport could not reach an agreement. Finally, on March 10, 1988, the airport passed an ordinance which unilaterally increased the fees. On April 1, 1988, this case was filed challenging the ordinance rates and the rates charged subsequent to December 31, 1986.³

¹ See Report from James C. Buckley, *Fees for the Use of Public Aircraft Facilities and Rental for Passenger Terminal Premises, for Freight Terminal Premises, for Rentable Buildings, and for Ground Space: Kent County Airport*, (February 1969).

² The term "general aviation" encompasses corporate aircraft and privately owned aircraft that are not used for transportation of military, public passengers, or cargo. The District Court found that over 160 general aviation craft are based at the Kent County Airport. *Northwest Airlines, Inc. v. County of Kent, Mich.*, 738 F.Supp. 1112, 1114 (W.D.Mich.1990).

³ The Airlines amended their complaint on May 9, 1988 and again on November 9, 1988.

The Airlines specifically dispute the landing fees of 70.21 cents per 1,000 lbs., the terminal building rental rates, the carrying charge, the fact that general aviation was not also charged based on their costs, and the Airport's allegedly excessive fund balance.

II.

Prior to the trial in this case, the District Court ruled on cross motions for summary judgment. The District Court held that the Airlines did have a private right of action under the Anti-Head Tax Act ("AHTA") and denied the Airport's motion for summary judgment. It also held, however, that the Airlines had no right of action under the Airport and Airway Improvement Act or the Interstate Commerce Clause of the United States Constitution. We agree with the District Court.

The defendants first claim that the Airlines are precluded from challenging the current rates in federal court under either the AHTA or Airport and Airway Improvement Act of 1982 ("AAIA") because they failed to exhaust their administrative remedies. The defendants argue that the Airlines must first raise any claims with the Secretary of Transportation under the AAIA before any claims may be made in the District Court. In *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court established four factors to be used in determining whether Congress intended to create an implied right of action. These factors are:

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area

basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78, 95 S.Ct. at 2088 (quoting *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916)) (emphasis in original; citations omitted). The Supreme Court has placed increasing emphasis on the second factor—the intent of Congress. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979); *Niagara Frontier Transp. Auth. v. Eastern Airlines Inc.*, 658 F.Supp. 247 (W.D.N.Y.1987).

Several courts have found that the AHTA satisfies all the *Cort* factors and that a private right of action exists. *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir.1987); *Niagara*, 658 F.Supp. at 247. Most importantly, the intent of Congress to grant a private right of action seems inherent in the language of the statute satisfying the second *Cort* factor. The AHTA expressly prohibits states from levying "a tax, fee, head charge, or other charge, directly or indirectly . . ." 49 U.S.C.A. App. § 1513(a) (West. Supp.1991). As noted by the First Circuit, this statute does not mention the Secretary of Transportation nor an administrative or judicial enforcement scheme like those created in similar statutes. *Interface Group*, 816 F.2d at 16. In addition, the other *Cort* factors are also met. Private enforcement furthers the purposes of the statute by ensuring that airlines will file claims that individuals may lack the time and expenses to pursue. The AHTA also clearly identifies the class to be protected. We find that the Airlines had no duty to exhaust administrative remedies as to the statutory claims made under section 1513.

The Airlines face different administrative requirements under 49 U.S.C.A. App. § 2210, the AAIA. A review of the *Cort* factors indicate that Congress intended that there would be no private right of action under section 2210.

The statute provides that assurances must be given to the Secretary of Transportation regarding the reasonable terms and rates of an airport development project. 49 U.S.C.A. App. § 2210 (West 1991); *Interface Group*, 816 F.2d at 15. This provision indicates that Congress intended to establish an administrative enforcement scheme.⁴ The AHTA and the AAIA do not cover similar issues or provide similar remedies. The AHTA addresses state taxation of air commerce for which recovery of unreasonable taxation or fees would be the remedy. The AAIA, on the other hand, requires certain assurances to be made prior to approval of an airport development project. Failure to make these assurances would result in denial of the grant. For this reason, all claims against the defendants under the AAIA were properly dismissed for failure to exhaust administrative remedies.

Second, the defendants assert that the Airlines are estopped or have waived their rights to object to the methodology and fees adopted by the defendants. They base this argument on the Airlines' failure to protest the fees during the twenty previous years. As support, they point to a December 22, 1983 letter from John Sorensen of United Airlines, then serving as the negotiator for all the Airlines, which they claim acknowledges the reason-

⁴ The Airlines argue that they are entitled to claim the protection of section 2210 despite the language giving responsibility to the Secretary of Labor. They place reliance on *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 721, 92 S.Ct. 1349, 1357, 31 L.Ed.2d 620 (1972), which applies the predecessor to section 2210 in determining Congressional intent regarding airport fees. *Evansville* involved a suit by the airlines against an airport. The airlines in *Evansville*, protesting the fees being applied by the airport, filed suit claiming that the fees were an unconstitutional burden on interstate commerce. The predecessor to section 2210, 49 U.S.C.A. § 1718(a)(8), was referred to as evidence that Congress did not intend to deny or preempt state or local power to levy charges to defray the cost of an airport. No reference was made as to whether the airlines would have had a private right of action under section 1718.

ableness of the rates. The defendants' argument is without merit.

The complaint filed by the Airlines clearly states that the protested fees were reportedly adopted on March 10, 1988 and became effective on April 1, 1988. The past fees referred to in the complaint are only those fees assessed subsequent to the contract which expired on December 31, 1986. The assessed fees do not represent rates which were agreed upon after negotiation. Rather, they are fees which were charged during the negotiation period. None of the protested fees or the requested remedies involves fees assessed under past contracts. The Airlines are not precluded from bringing a judicial challenge to rates because in the past they agreed to different assessed rates. The rates agreed to in the past are the result of negotiations between the Airlines, the County, and the Airport. *Northwest Airlines, Inc. v. County of Kent, Mich.*, 738 F.Supp. 1112, 1114 (W.D.Mich.1990). Only in 1988, when negotiations were unproductive, were these claims brought.

Finally, defendants argue that the Airlines do not have standing to raise issues based on rates, fees or charges to passengers and other non-aeronautical users of the airport. Defendants assert that the Airlines must show a causal connection between the damages they claim and the defendants' acts. See *In Re Air Passenger Computer Reservation Sys.*, 727 F.Supp. 564, 568 (C.D.Cal.1989). While it is clear that section 1513 gives the airlines a private right of action, the private right of action given in the statute to passengers may not be asserted by the airlines. The legislative history of the AHTA recognizes that by banning unreasonable taxes on the carriage of air passengers from being passed on to the consumer. See S.Rep. No. 12, 93d Cong., 1st Sess., reprinted in 1973 U.S.Code Cong. & Admin.News 1434, 1451; *Interface Group*, 816 F.2d at 16. Thus, the airlines ensure fair rates in a situation where the charges may be passed through the

airlines to the consumer. Individual consumers in these situations may not contest the charges because of financial or time constraints. However, this reasoning does not apply in cases where the charges are being assessed directly to the passengers or other airport users. In these cases, users feel the direct impact of the charges and many, such as the concessionaire, are capable of asserting the claims. For the above reasons, we find that the Airlines have no standing to assert the claims of the non-airline airport users or passengers.

III.

The AHTA prohibits the imposition of any fee on "persons traveling in air commerce or on the carriage of persons traveling in air commerce" which are unreasonable. 49 U.S.C.A. App. § 1513(a) (West Supp.1991). Reasonable fees on "aircraft operators for the use of airport facilities" are allowed.⁵ The statute does not provide guidance for determining what constitutes a reasonable fee. The Seventh Circuit, in *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir.1984), held that fees "wholly disproportionate" to the costs of serving the airline and airline passengers were unreason-

⁵ The text of section 1513 reads, in pertinent part,

(a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom;

(b) . . . [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 U.S.C.A. App. § 1513 (West Supp.1991).

able. The plaintiffs have the burden of proving that the rates are unreasonable in light of the benefits conferred on them. *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972); *American Airlines, Inc. v. Massachusetts Port Auth.*, 560 F.2d 1036 (1st Cir.1977). Deference is given to the rates established by the state and administrative agencies as long as they act within a broad range of reasonableness. *Evansville*, 405 U.S. at 712-14, 92 S.Ct. at 1353-54.

A. Reasonableness of the Rates Charged to Concessions

The Airlines' argument suggests that overall the rates and fees established under the ordinance are inherently unreasonable because they result in a substantial profit for the Airport. The District Court found that the Airport had over \$9 million in reserves at the end of 1989. Concessions are all the non-aeronautical users: parking lot, car rentals, restaurants, motels, gift shops, advertising, and food services. The fees charged by the Airport to these concessions generate a surplus of \$2 million per year and result in a large reserve. The Airport views this surplus as a "contingency" fee to be used at a later time. The Airlines assert that this profit is prohibited by the AHTA and should properly be used to reduce the charges to the Airlines.

Non-airline concessions are not within the scope of the AHTA. As noted by the District Court, the statute does not mention concessions. Rather, section 1513(b) permits airports to charge reasonable fees and charges from *aircraft operators*. The Seventh Circuit opinion on which the Airlines rely for their assertions is distinguishable. In *Indianapolis Airport*, the court held that an ordinance was unreasonable which disregarded airport concession revenues when establishing the airline rates and fees. Such a result, wrote Judge Posner, is "wholly disproportionate to the costs to the airport of serving the airlines and their passengers, and is therefore unreasonable. . . ." 733 F.2d at 1268. Judge Posner relied on two fac-

tors in *Indianapolis Airport* which distinguish that case from the one now before us. First, the Indianapolis airport serves in a monopoly environment. As judicially noticed by the District Court, Kent County Airport is located less than an hour and a half from two airports serviced by major airlines. This means that the passenger has some role in determining from which airport to travel. Second, the Seventh Circuit required the plaintiffs to prove that the rates imposed directly affected the airline or airline passengers and not other parties not parties to the case. As did the District Court, we find the reasoning articulated by the Colorado District Court in *City and County of Denver v. Continental Airlines, Inc.*, 712 F.Supp. 834 (D.Col.1989) persuasive:

Persons affected by the rates, rentals and charges for the restaurants, gift shops, parking lots and rental cars, include persons who are not air passengers. These accessory uses of the airport may be considered amenities for air passengers and convenient for them, but no person traveling to, from or through Stapleton on United or Continental flights is required to park in the parking lot, rent a car, eat at a restaurant or buy a magazine. Those are all individual decisions driven by individual perceptions of need and economic values. That is not the case with respect to the use of the airport's runways, taxiways, and airline portions of the terminal area. There, the air passenger is captive and her purse is necessarily and directly affected by Denver's charges to the airlines for those uses. Stated differently, Denver's decision to operate concessions at a profit is not an exploitation of airline passengers who have the freedom of choice to use the amenities Denver has provided.

712 F.Supp. at 838-39. We find that the AHTA does not apply to charges assessed to non-airline concessions and agree with the District Court that the Airlines may not require the cross-credit of concession revenue surplus against their rates and fees.

B. Allocation of fair share costs to concessions

The Airlines were assessed nearly \$2 million in fees for 1988. This figure includes 76% of the costs of the passenger terminal building. The remaining 24% of the costs are allocated to concessions including restaurants, hotel, baggage carts and lockers.⁶ The cost allocation is based on floor space occupancy. The Airport asserts that the cost allocation of common space is made in the same proportion as the percentage of terminal space the user occupies exclusively. The Airlines respond that the Airport's cost allocation is unreasonable in violation of AHTA. The Airlines contend that the 76% allocation results in the Airlines paying for 100% of the public spaces. Appellant's Brief at 29 n. 46.

A fee assessed is reasonable as long as it is based on some fair approximation of the cost of providing the facilities and services, is relevant to the operation of the airport, and is not arbitrary and capricious, but is based on a uniform, fair and practical standard. See *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 712-14, 92 S.Ct. 1349, 1353-54, 31 L.Ed.2d 620 (1972), quoting *Hendrick v. Maryland*, 235 U.S. 610, 624, 35 S.Ct. 140, 143, 59 L.Ed.2d 385 (1915); *Massachusetts Port Auth.*, 560 F.2d at 1038. An assessment of costs for the common space need not depend on a district court's estimate of the benefits each renter derives from its customers' use of the common area. Although such a method would be a possible method for assessing costs, there is nothing in the Act that dictates that such a method *must* be used.

There is no support for the Airlines' assertion that they pay for 100% of the "public spaces" cost. The Airlines' expert, Richard Dompke, testified that while 100% of the baggage claim area costs are allocated to the Airlines, the costs of common areas surrounding the restaurant,

⁶ Some of the concessions, such as telephones and advertising space, are allocated no costs at all.

cocktail lounge, gift shop, and game room, are assigned to all users of the terminal building "on an equitable basis." Dompke also testified that part of concourse A has been designated as a public area, and that for this area, 76% had been charged to the Airlines. R.E. No. 162, pp. 163, 164. The Airport's witness, John F. Brown, stated that the Airlines are not charged at all for the space that is roped off where passengers line up to get their ticket and check in their luggage. The lease signed by the parties indicates that an airline must pay a rental rate based on a square footage basis for the ticket wings, concourse level, holding rooms, lounges, and office space which it occupies. Rental of the baggage claim and tag circulation area is apportioned between the users of these areas. Because there is no support in the record that 100% of the costs associated with all common areas of the terminal building are charged to the Airlines, the Airlines have failed to show that the terminal facility fees assessed to them are unreasonable. We therefore affirm the District Court on this issue.

C. Allocation of fair share costs to General Aviation

The \$2 million in fees for which the Airlines are assessed also reflects airside costs for runways, taxiways, and passenger terminal aprons. The Airport allocates these airside costs to general aviation and the Airlines. General aviation, however, is only assessed 20% of its allocated costs. General aviation should be assessed its full allocation of airside costs. The deliberate decision not to assess general aviation its full cost allocation of airside service costs discriminates against the Airlines in favor of locally owned aircraft. The Seventh Circuit, in *Indianapolis Airport*, held in a similar situation,

The difference in the Authority's treatment of airlines and private planes—making the former pay for the full costs (and more!) that they impose on the airport, but through inaction, allowing the latter to get away with paying little more than half of the

costs they impose—has not been justified. And since flights by private planes are more likely to be intra-state than airline flights are, the effect of leaving the flowage fee unchanged has been to shift some of the costs imposed by local users of the airport to its interstate users, who are, along with many of their customers, non-residents of [the state where the airport is located]. This is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act.

733 F.2d at 1271. The fact that concession revenues compensate for the underassessment does not justify the discrimination. The concession revenues could be used to purchase improvements or additional equipment that would potentially benefit both the concessions and the Airlines. All income from the airport must ultimately be used for airport maintenance or improvement or for a new facility. Thus, failing to assess general aviation for their total costs reduces the benefits which could accrue to the Airlines from the increased revenue.

D. Crash/Fire/Rescue Charges to General Aviation

The landing fees charged to the Airlines increased from 50 cents to 70.21 cents per 1,000 lbs. of aircraft weight in 1988. Approximately 50% of this increase was due to an increase in the costs of crash/fire/rescue ("CFR") services. Provision of these services was extended over the entire 24-hour period as opposed to the 18 hours of service previously provided. The Airlines pay 100% of the CFR costs. General aviation, while receiving these services, is allocated none of the cost. The Airlines contend that these services clearly benefit general aviation, as well as terminal and parking lot tenants, and that the allocation of the CFR costs should reflect this benefit.⁷

⁷ In fact, one witness testified that most of the CFR runs did not involve air carrier aircraft. Deposition of Robert M. Ross.

Any airport, in order to receive certification, must maintain CFR facilities if the airport serves air carrier aircraft with more than 30 passenger seats.⁸ 49 U.S.C.A. App. § 1432(a) (West Supp.1991). The defendants assert that since the Airport would not be required to maintain CFR facilities if only general aviation aircraft used the facilities, general aviation should not share the burden of paying for the services. This position fails to account for the fact that CFR facilities are provided and maintained and service general aviation. The CFR facilities answer and service non-airline calls and rescues. These services increase the cost of maintaining and providing CFR services. If the CFR only responded to commercial airline rescue calls, then the 100% allocation would be appropriate. Charging the Airlines for 100% of the cost of CFR services where general aviation and concessionaires, such as car rental companies, receive a substantial benefit is "unreasonable" under the terms of the AHTA. The fact that the CFR services are initially provided because of regulations requiring the services for commercial airlines does not validate allocating the costs of such services only to those airlines when the service provided is adequate to cover all aircraft which use the Airport.

E. Amortization of Carrying Charges

The Airport allocated to the Airlines "carrying charges" or amortization fees for assets acquired. The defendants assumed when calculating the carrying

⁸ Air carriers aircraft includes only those aircraft which are engaged in

the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce

49 U.S.C.A. App. § 1301(24) (West Supp.1991). See also 14 C.F.R. § 139.3 (defining "air carrier aircraft"); 49 U.S.C.A. App. § 1301(3) (West 1976) (defining "air carrier"); 49 U.S.C.A. App. § 1301(10) (West 1976) (defining "air transportation").

charges that the capital assets were acquired with a non-existent 25 or 30 year mortgage. Such a mortgage results in interest charges in addition to the historical cost. The Airlines argue that such a charge results in the Airport recovering 2½ times the initial cost. The defendants claim that such a charge provides the Airport a reasonable return on its investment and is similar in scope to the interest charged by a financing institution. The interest rate adopted for the carrying charge is 8% and it is applied to useful life of the assets. This rate is reasonable and should not result in a net present value which exceeds the initial cost of the project.

IV.

The Airlines urge that we find any claims which are not unreasonable under the AHTA unreasonable under the laws of the State of Michigan. Since we have found that the defendants failed to allocate the proper costs to general aviation, we address only the issue of surplus revenue from concessions under Michigan law. Michigan law provides, in regard to the fees charged by the operator of a public airport,

[The] terms, charges, rentals, and fees shall be equal and uniform for the same type of facilities provided, services rendered, or privileges granted with no discrimination between users of the same class of like facilities provided, services rendered, or privileges granted; however, the public shall not be deprived of its rightful, equal and uniform use thereof. Terms, charges, rentals and fees may vary where necessary to provide security and funds for payment of bonds to be issued as authorized for payment of bonds to be improvements to any airport, or to allow for other differing costs of financing, construction of facilities, or maintenance and operation of the facility.

Mich.Stat.Ann. § 10.233(e) [M.C.L.A. § 259.133(e)] (Callaghan 1981). The Airlines argue that because the

fees generated by the concessions generate more than is "necessary" to cover airport costs, they are contrary to state law. The Airlines cite no foundation, either in the language of the statute or in case law, which supports their position. Nothing in the statute suggests that generating revenue through charges to concessions is against Michigan law. Rather, the statute addresses nondiscrimination among similar users and considerations which may be made when setting rates. We find that the Airlines' claims that the Airport's surplus revenue is generated in violation of Michigan law to be without merit.

V.

The Airlines also submit that the Airport's fees violate the Commerce Clause because of the burden they place on interstate travel. The Supreme Court in *Evansville* established three tests to determine whether the Commerce Clause had been violated: whether fees discriminate between interstate and intrastate users, whether they approximate each user's receipt of beneficial services, and whether they are excessive in relation to the Airport's actual costs. 405 U.S. at 707, 92 S.Ct. at 1349. The Airport claims that the status of the factual record does not support this claim and that in any event the Commerce Clause is not legally applicable. We find that the District Court, relying on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), properly dismissed the Commerce Clause contention in its January 19, 1990 decision.

The Supreme Court, in *Merrion*, held that courts should only undertake a Commerce Clause review of a tax or regulation if Congress had taken no other action to regulate the area. Here, Congress has established clear guidelines for the fees and rates that may be charged commercial airlines and other public airport users. As the District Court found, where the issue before the court is the reasonableness of the fees under AHTA, the

court should only look at the consistency between the fees and Congressional policy. Thus, the District Court's dismissal of the Airlines' Commerce Clause claim was correct. The Airlines contend that the District Court's decision to dismiss the Commerce Clause claim ignores a recent Eleventh Circuit opinion, *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991). This case however involves a different type of dispute. In *Alamo*, an off-airport rental car company protested the imposition of a user fee of 10% of all gross receipts from the rental of cars to passengers picked up at the airport. The AHTA clearly does not cover off-airport rental car companies. Thus, *Alamo* was not disputing a tax or regulation in an area where Congress had acted and was therefore not barred by *Merrion* from suing under the Commerce Clause.

VI.

Accordingly, the decision of the District Court is REVERSED and REMANDED in order that the costs associated with CFR services may be properly allocated between the Airlines and general aviation. With regard to the Airlines' claim that the concessions are under-assessed for their associated costs and that the Airlines are entitled to be cross-credited for surplus revenue generated by concession fees, the decision of the District Court is AFFIRMED. The majority of the court also confirms the decision of the District Court with regard to the method used to assess airside operation fees.

CONTIE, Senior Circuit Judge.

I concur in Judge Kennedy's opinion, except for Part III(C), allocation of fair share costs to General Aviation. On this issue, I write for the majority as Judge Nelson and I agree that the method the Airport used to assess airside operation fees for General Aviation and the Air-

lines was a reasonable method within the meaning of the Act.

In regard to the allocation of other costs, I agree with Judge Kennedy that the allocation of terminal rental costs between the Airlines and the concessions was reasonable, because 100% of these costs was not charged to the Airlines. In regard to crash, fire and rescue charges, I agree with Judge Kennedy that it is unreasonable to allocate 100% of these costs to the Airlines and that a remand to the district court is necessary to determine a proper allocation. Judge Nelson dissents from this position.

I will now deliver the opinion of the court with respect to Part III(C), allocation of fair share costs to General Aviation.

The Airlines argue that the Anti-Head Tax Act, 49 U.S.C. App. § 1513(a), has been violated because the Airport unreasonably charges the Airlines 100% of their airside operations costs for their use of the Airport's runways, taxiways, hangars, and passenger terminal apron, but charges General Aviation (corporate and private aircraft) only 20% of the airside operation costs, which it incurs. The Airlines argue that the Act requires that General Aviation be charged the full amount of its airside operation costs.

I do not agree. Since the shortfall in the costs incurred by General Aviation does not come out of the Airlines' pocket, but is made up instead out of concession revenues, this court has no authority to order that General Aviation must be charged 100% of its airside operation costs. The plain language of § 1513(a) of the Act applies only to persons traveling in "air commerce." The statute thus does not give the federal courts the authority to dictate how an airport should manage its business in regard to corporate and private aircraft or concessions, but indicates that a court may interfere only in regard to the reasonableness of the rates charged to commercial air-

lines. It is not unreasonable for the Airport to charge the Airlines 100% of their airside operation costs and General Aviation only 20% of its airside operation costs as long as the Airlines are not required to pay for the 80% "loss" the Airport incurs in regard to General Aviation.

In the present case, General Aviation is charged a four-cent-per-gallon fuel flowage fee and a landing fee which raises less than 20% of the landing area costs created by General Aviation. The shortfall incurred by General Aviation is made up out of the surplus revenues generated by the fees paid by the concessions. The Anti-Head Tax Act is limited in scope to the reasonableness of the rates charged to commercial aircraft operators and does not concern the revenues derived from concessions. Therefore, a federal court does not have the authority to state that instead of using concession revenues to make up the shortfall, General Aviation must be charged 100% of its airside operation costs. A discrepancy in a fee vis-a-vis different types of air carriers based on an operational cost is unrelated to the Anti-Head Tax Act's prohibition against charges on "persons traveling in air commerce." *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 170 (1st Cir. 1989). Moreover, even if General Aviation were charged 100% of its airside operation costs, the Airport reasonably could continue to charge the Airlines 100% of their airside operation costs. Thus, the demand which the Airlines make would not necessarily bring them any relief.

To reiterate, the Anti-Head Tax Act authorizes the federal courts to intervene in the setting of airports rates and charges only in the limited circumstance where the rates charged to commercial airlines are unreasonable. The decision of the Airport in the present case to charge the Airlines 100% of their airside operation costs, but to charge General Aviation only 20% of its airside operation costs, does not result in discriminatory treatment

against the Airlines, because the shortfall from General Aviation is not paid for by the Airlines but is made up out of the surplus concession revenues. This Court is in agreement that the Airlines are not entitled to a cross-credit of concession revenues. Therefore, the Airlines do not have standing to challenge what is done with the concession revenues in regard to General Aviation. The Airlines do not contend that the fees charged them for their airside operations costs are arbitrary or capricious and concede that the fees are based on the actual break-even costs calculated on the basis of aircraft weight and number of landings. Because the fees charged to the Airlines for their airside operations have a reasonable relationship to the actual costs incurred, they are reasonable within the meaning of the Anti-Head Tax Act. The decision of the district court that the method the Airport used to assess airside operations fees was a reasonable method is hereby AFFIRMED.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part.

I would affirm the judgment of the district court in its entirety. I agree with what Judge Contie has written with respect to the issues addressed in Part III(C) of Judge Kennedy's lead opinion (allocation of fair share costs to concessions and general aviation), but I am not persuaded that the airport acted unreasonably in its treatment of the cost of crash/fire/rescue services. Accordingly, I dissent from Section III(D) of the lead opinion and from the portion of the judgment that orders a remand.

In joining Judge Kennedy's opinion on the allocation of costs between the airlines and other users, I wish to add a few words on the treatment of the public spaces in the passenger terminal building. Under 49 U.S.C. App. § 1513(b), the airport is allowed to levy and collect "reasonable" rental charges from aircraft operators. The

airport has considerable leeway in determining what is reasonable, and even if the record showed that 100 percent of the amortization and operation and maintenance cost of the public spaces in the terminal was being allocated to the airlines, I would be reluctant to conclude that such an allocation was unreasonable.

It would not be unreasonable, I think, to view airline traffic as the *raison d'être* of the terminal. Professor Ferdinand Levy, a highly qualified economist, testified that "you could cut out all the concessions [through the use of satellite parking and so forth] and you could still have the airport and the airlines." (Trial transcript, pp. 993-94.) And if the fundamental purpose of the terminal is to serve the airlines and their customers, it would not be unreasonable to assign to the airlines the full break-even cost of the terminal's public spaces.

The same logic informs the district court's discussion of the assignment to the airlines of the cost of crash/fire/rescue ("CFR") services:

"Plaintiffs argue that they should not be charged 100% of CFR expenses. This Court agrees with the Indianapolis court that such costs are properly allocable 100% to the airlines. 733 F.2d at 1271. The CFR costs are incurred solely because of the presence of plaintiffs and other commercial airlines at the Airport. If all the concessionaires, general aviation and fixed based operators terminated their tenancies with the Airport, the Airport would still be required to provide CFR. If all the commercial airlines ceased service at the Airport, the Airport would no longer be required to provide CFR. In addition, at trial Dean Nitz, an FAA agent, testified that it was appropriate to charge all CFR costs to the commercial airlines. Therefore, the Court finds that a charge of 100% of CFR to plaintiffs does not violate the

AHTA." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F.Supp. 1112, 1119 (W.D.Mich.1990).

I agree with this analysis.

The airport's method of allocating CFR costs is not the only acceptable method, to be sure, just as its method of allocating terminal space costs is not the only acceptable method. Economists and cost accountants recognize a wide variety of different methods for assigning costs within a business that offers multiple services to multiple customers. In the absence of a statutory cost allocation formula, however, the courts have no warrant to require the use of one acceptable method in preference to another. *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589, 65 S.Ct. 829, 833, 89 L.Ed. 1206 (1945). Justice Douglas, who spoke for the Court in *Colorado Interstate Gas*, explained that

"where as here several classes of services have a common use of the same property difficulties of separation are obvious. Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Id.* (Citation omitted.)

Cf. National Association of Greeting Card Publishers v. United States Postal Service, 462 U.S. 810, 825, 103 S.Ct. 2717, 2727, 77 L.Ed.2d 195 (1983), a unanimous opinion where the last three sentences of this passage were quoted with obvious approval.

Rate-making, including the cost-allocation component of rate-making, "is essentially a legislative function." *Colorado Interstate Gas*, 324 U.S. at 589, 65 S.Ct. at 833, citing *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1876). Where, as here, a challenged rate structure rests on essentially legislative judgments that meet the applicable statutory test, is not appropriate for the courts to substitute their judgment for the judgment of the rate-makers.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. MICHIGAN, S.D.

No. 1:88-CV-243

NORTHWEST AIRLINES, INC.; SIMMONS AIRLINES, INC.;
PIEDMONT AVIATION, INC.; COMAIR, INC.; MIDWAY
AIRLINES (1987), INC. formerly, FISHER BROS. AVIA-
TION, INC.; USAIR, INC.; AMERICAN AIRLINES, INC.;
and UNITED AIR LINES, INC.,

Plaintiffs,

v.

COUNTY OF KENT, MICHIGAN; THE KENT COUNTY BOARD
OF AERONAUTICS; and THE KENT COUNTY DEPART-
MENT OF AERONAUTICS,

Defendants.

June 18, 1990

Malcolm C. Mallette, James C. McIntire, Indianapolis,
Ind., Douglas E. Wagner, Mark S. Bransdorfer, Grand
Rapids, Mich., for plaintiffs.

W. Fred Hunting, Jr., Robert A. Buchanan, Mark S.
Allard, Grand Rapids, Mich., for defendants.

OPINION OF THE COURT

ROBERT HOLMES BELL, District Judge.

On April 1, 1988, plaintiffs filed suit in this Court
alleging that the rates charged plaintiffs by defendants

were unreasonable and in violation of federal and state law. Plaintiffs are commercial airlines which use the Kent County International Airport (Airport). Defendants are Kent County, the Kent County Department of Aeronautics and the Kent County Aeronautics Board (KCAB). The Airport is located in and owned by Kent County, Michigan. The KCAB is the arm of Kent County which manages the Airport and determines the rates to be charged the various users.

Procedural History

In their complaint and amended complaints, plaintiffs alleged that the landing fees, rental rates and aircraft parking fees set by the KCAB by resolution effective April 1, 1988 were unlawful. Plaintiffs alleged that these fees violated the Commerce Clause of the United States Constitution (U.S. Const. Art. I, § 8, cl. 3), the Anti-Head Tax Act (AHTA) (49 U.S.C.App. § 1513), the Airport and Airway Improvement Act (AAIA) (49 U.S.C. App. § 2201 et seq.) and any applicable state laws. Defendants answered by asserting that the federal statutes did not confer jurisdiction on this Court in this situation and asserting that the fees charged were reasonable. Defendants filed a counterclaim asking the Court to require plaintiffs to pay defendants the difference between what plaintiffs were paying and the new rates (Ordinance Rates). Defendants also sought a finding by this Court that plaintiffs were now month-to-month tenants. By stipulation of the parties in November 1988, the parties agreed that the plaintiffs would continue to pay the fees specified in plaintiff's most recent leases during the pendency of this matter. The parties stipulated that such interim fee payments would not serve as a waiver on the question of the reasonableness of any of the fees.

In January 1989, plaintiffs and defendants filed cross motions for summary judgment. Although plaintiff's motion asked for summary judgment on all issues, the

Court, by agreement of the parties, addressed only the issue of the legality of the rate making methodology employed by the KCAB. In an opinion and order entered June 22, 1989, the Court denied plaintiffs' motion for summary judgment finding that it could not rule that the methodology used by the KCAB in setting rates was *per se* illegal. The Court found that the methodology could be used to formulate reasonable fees.

In January 1990, the parties again filed cross motions for summary judgment. Defendants sought to have all of plaintiffs' claims dismissed on the basis that there was no federal question involved. Plaintiffs sought summary judgment on the basis that the facts were now undisputed that defendants rates were unreasonable. The Court granted partial summary judgment for defendants and denied plaintiffs' motion for summary judgment. The Court found that there was no cause of action under the Commerce Clause and that there was no private right of action under the AAIA. However, the court found that plaintiff did state a cause of action under the AHTA.

This case went to trial before the Court on February 12, 1990 on the question of whether the rates charged plaintiffs violated the AHTA. Defendants argued that the rates did not violate the AHTA and were supported by Michigan law, being M.C.L. § 259.133; M.S.A. § 10.233. The parties submitted proposed findings of fact and conclusions of law to the Court. By a preponderance of the evidence, the Court has made the findings of fact set forth in the following section of this opinion.

Background

The Court finds that the Airport has three runways. One east-west runway is a 10,000 foot runway that serves both commercial airlines and general aviation aircraft. General aviation aircraft are corporate aircraft and privately owned aircraft that are not in commercial, passenger, cargo or military service. Two of the runways are too short to serve most jet aircraft and serve general

aviation aircraft with only occasional use by commuter airline aircraft.

The Court finds that the Airport has an air passenger terminal building used by the KCAB for administrative offices, by government agencies, by plaintiffs and by a number of concession users. There is a terminal building apron in the landing area which is used by plaintiffs and on which plaintiffs' planes rest when they are at the airline gates. Airline passengers and those greeting airline passengers park in a passenger terminal building parking lot ("Parking Lot") for which they are charged. Employees of the airlines and others having business at the Airport park in an employees' parking lot without charge.

The Court finds that the Airport has extensive hangers for general aviation aircraft, together with concrete and grass parking areas for general aviation aircraft. There are three fixed base operators that service and repair general aviation aircraft. Steel Case and Amway have large corporate hangers at which they service and maintain corporate general aviation aircraft, including a 727 and two BAC-111 jet aircraft. Over 160 general aviation are based at the Airport.

The Court finds that the relationship between the Airport, plaintiffs and other nonairline concessionaires is one of landlord and tenant. This relationship manifests itself in leases entered into between the Airport and various users of the Airport. Although the Airport establishes the rates and fees to be charged to plaintiffs, the history of the parties demonstrates that the rates and fees finally incorporated in leases were determined through negotiations between the Airport and plaintiffs. This process broke down after the expiration of the last leases on January 1, 1987. Due to the inability of the parties to reach any negotiated agreement in 1987 or 1988, the KCAB implemented new rates by way of resolution on April 1, 1988 (the Ordinance Rates).

The Court finds that generally airports formulate rates and fees for airline tenants using either a compensatory or residual cost methodology. Compensatory methods base rates and fees on the actual cost of providing the particular facility and services used. Residual cost methods base the rates and fees on the total cost of operation of the airport. The essential difference between these methods is that a compensatory methodology does not take into account any interdependencies between the various airport revenue centers in establishing rates and fees. A residual cost method recognizes such interdependencies and cross credits revenues generated by one tenant among contributing tenants.

The Court finds that since 1968 the KCAB has used a compensatory methodology known as the Buckley Methodology.¹ As used by the KCAB, the Buckley method attempts to assess user fees and rental rates only for plaintiffs' use of the facilities, services, and certain other allocable operating costs (overhead, maintenance and administration). The Buckley method does not base its cost analysis on the replacement cost value or the current market value of the land or facilities. Rather, it uses the historical actual cost of the assets. The cost basis does not include taxes and does not include the cost to the Airport for various non-airline services or other tenants, such as the United States government weather service, customs office, FAA offices, the Parking Lot, various concessions (car rental, restaurant, gift shop, amusements) or the Airport motel. In addition, the KCAB deducts all state and federal funding from the cost basis. Although the Buckley method allocates costs to be recovered from general aviation and various nonairline tenants, the rate study is not used to determine

¹ This compensatory method for determining user fees and rental rates was named after James E. Buckley (d. 1981), an airport consultant, who assisted in developing the Kent County International Airport. Buckley articulated his approach in "General Principles With Respect to Airport Rate Making" (Plaintiffs' Exhibit 20).

the charges for those Airport users. The Buckley method is simply a tool used to determine the break-even costs for the airlines' use of the Airport.

The Court finds that under the Buckley methodology, plaintiffs are assessed costs in three areas: runway areas, terminal area and crash fire rescue (CFR). The costs allocated to the runway area are used to determine the landing fee and the aircraft parking fee. The terminal area costs are used to determine the rental rate to be charged. The rental rates are for space plaintiffs use in the terminal. KCAB does not charge plaintiffs for parking which is made available to plaintiffs' employees, for use of conference rooms, for the roped off space in front of plaintiffs' ticket counters, for aisle space in the concourse or for lobby spaces used by passengers. The airlines are charged 100% by CFR.

The Court finds that in 1986, the KCAB, using the Buckley method, formulated the Ordinance Rates to be effective January 1, 1987. Prior to the Ordinance Rates, plaintiffs paid rates and fees from 1984 to 1987 which were set by leases which expired on January 1, 1987 (Prior Rates). The plaintiffs challenge the legality of the Buckley method and the reasonableness of both the Prior Rates and the Ordinance Rates. In that regard, plaintiffs have proposed rates and fees which they believe are reasonable. All three rates are set forth below:

	Prior Rates	Ordinance Rates	Airlines' Proposed Rate
Landing fee (per thousand lbs)	\$.50	\$.70	\$.138
Aircraft Parking Fee (per thousand lbs.)	\$.44	\$.32	N/C
Prime space, finished, heated, and air-conditioned space	\$18.00/sq. ft.	\$24.67/sq. ft.	\$8.34/sq. ft.
Non-prime air-conditioned space	\$11.75/sq. ft.	\$12.34/sq. ft.	\$4.17/sq. ft.
Non-prime, unfinished, heated-not air conditioned space	\$10.50/sq. ft.	\$12.34/sq. ft.	\$4.17/sq. ft.

The Court finds that in addition to the rates and fees charged the airlines, the KCAB enters into rental agreements with other Airport tenants and charges a fuel flowage fee to general aviation aircraft. Instead of charging concessions a rate per square foot, the KCAB charges them a percentage of their gross receipts. For example, the Buckley method allocates costs of approximately \$28,000 (1,120 sq. ft. \times \$24.67/sq. ft.) to the rental car concessions. However, the rental car companies pay the Airport 10% of their gross receipts which amounts to a payment in excess of \$675,000 per year. The Buckley method does not allocate any costs to the pay telephone and advertising concessions. These concessions pay the KCAB \$100,000 per year with one half of that amount deducted from the costs of the terminal. The Parking Lot is allocated costs of \$688,000 but generates revenues for the Airport of approximately \$1,600,000 per year. These examples show a surplus from certain concessions and the Parking Lot of approximately \$1,609,000. This figure does not take into account any surplus from payments made by other concessions, itinerant general aviation (such as tie down charges), fixed base operators or hanger charges to entities such as Steel Case.

The Court finds that locally based general aviation pays a fuel flowage fee of \$.04 a gallon and itinerant general aviation pays a landing fee for use of the runway. The fuel flowage fee has not changed since 1967. These fees bring revenue of less than \$125,000 a year to the Airport. The Buckley method allocates costs of \$650,000 to general aviation. Therefore, there is a shortfall of approximately \$525,000 per year from general aviation. However, even with this shortfall, the Airport receives surplus revenue from nonairline users of more than \$1,000,000 per year.

The Court finds that with regard to the rates charged to plaintiffs, the Buckley method allocates \$28,000 in costs for the area set aside for overnight aircraft parking.

The actual fee charged plaintiffs for overnight parking amounts to more than \$100,000 per year. The KCAB also charges the Airlines 100% of the crash fire rescue (CFR) costs.

The Court finds that the Airport has less than \$2,000,000 in outstanding debt, the balance of which will be retired in 1994. At the end of 1989, the Airport had reserves of over \$9,000,000.

Analysis

The basic issue before the Court is whether rates and fees charged and proposed to be charged plaintiffs by defendants are reasonable under the AHTA. Plaintiffs have the burden of proving that the rates and fees are unreasonable in light of the benefits conferred on plaintiffs. *Evansville-Vandenburg Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972); *American Airlines, Inc. v. Massachusetts Port Authority*, 560 F.2d 1036 (1st Cir.1977); *Raleigh-Durham Airport Authority v. Delta Airlines*, 429 F.Supp. 1069 (D.N.C. 1976); *Southern Airways, Inc. v. City of Atlanta*, 428 F.Supp. 1010 (N.D.Ga.1977).

Plaintiffs' fundamental claim is that the Buckley methodology violates the AHTA because it produces rates which are unreasonable. Plaintiff attacks the method on several grounds. Plaintiffs argue that the method is illegal because (1) it results in exorbitant profits for the Airport which far exceed the costs that the plaintiffs impose on the Airport; (2) it considers surplus concession revenues as profit and does not cross credit the surplus to plaintiffs in setting their rates and fees and (3) it discriminates against plaintiffs in favor of general aviation users. The overriding theme to plaintiffs' argument is that the rates and fees are inherently unreasonable since they generate a surplus in excess of \$2,000,000 per year and have resulted in a cash surplus on hand in 1989 of over \$9,000,000.

Plaintiffs maintain that in order for the Buckley compensatory method to comply with the AHTA, the KCAB must cross credit the concession revenues when establishing plaintiffs' rates and fees. This contention by plaintiff would essentially require the Airport to share the surplus revenues from nonairline users with plaintiffs. In 1973 Congress passed the Airport Development Acceleration Act ("ADAA") Pub.L. 93-44, 49 U.S.C. § 1714(a), (b), to increase federal funding of Airport development. Congress included the AHTA as part of the ADAA. Specifically the AHTA prohibited direct or indirect "head taxes" on airline passengers and overruled the holding in *Evansville-Vandenburg Airport Authority Dist. v. Delta Airlines*, *supra*, which permitted airport taxes and levies on persons traveling in "air commerce." Since air travelers were subject to an 8% federal ticket excise tax, Congress intended to prohibit any similar state tax on air travelers. See S.Rep. No. 12, 93 Cong., 1st Sess. 1, reprinted in 1973 U.S.Code Cong. & Admin.News 1434, 1446. *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 104 S.Ct 291, 78 L.Ed.2d 10 (1983); *Salem Transportation Company v. Port Authority of New York and New Jersey*, 611 F.Supp. 254, 257 (S.D.N.Y.1985).

The AHTA in part provides:

§ 1513(a)

No State (political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons travelling in air commerce or on the carriage of persons travelling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.

§ 1513(b)

[N]othing in this section shall prohibit a State (or political subdivision thereof . . .) . . . from levying or collecting reasonable rental charges, landing fees,

and other service charges from aircraft operators for the use of airport facilities.

The plain reading of § 1513(a) applies only to persons or the carriage of persons traveling in air commerce or the sale of air transportation or the gross receipts therefrom. The statute clearly focuses on air commerce. The Federal Aviation Act, 49 U.S.C.App. § 1301(4), (23), and (24) defines the terms: "air commerce," "interstate air commerce," and "interstate air transportation." "Air commerce" refers to "operation or navigation of aircraft"; "interstate air commerce" and "interstate air transportation" refer to "carriage by aircraft of persons or property." The statute simply does not reference non-airline concession activity. Further, § 1513(b) does permit airport authorities to "levy and collect *reasonable* rental charges, landing fees, and other service charges from *aircraft operators* for the use of airport facilities." (Emphasis supplied.) Facially, nonairline concession revenues are not within the scope of the AHTA. Accordingly, the AHTA does not support the plaintiffs insofar as they seek to require the Airport to cross credit nonairline concession revenues to plaintiffs for purposes of establishing their rates and fees. *City and County of Denver v. Continental Air Lines, Inc.*, 712 F.Supp. 834, 837-8 (D.Colo. 1989).

Historically large "hub airports" generated sufficient revenues to fund development. The legislative history of the ADAA, of which the AHTA is a part, acknowledged that airports retained and used nonairline concession revenues that exceeded expenses. Congress contemplated that profitable airports would use such funds for local airport expansion and other capital projects. *Id.* at 837. In this regard, the *Denver* Court stated:

The legislative history of the Anti-Head Tax Act reinforces this court's conclusion that Congress did not intend it as a restriction on the collection and

use of concession revenues. Nowhere in the legislative history of the Anti-Head Tax Act is there any indication that Congress intended to regulate rates charged to concessionaires, and there is no indication that Congress sought to preclude airport operators from generating surplus revenues from concessionaires to fund airport expansion and development. On the contrary, Congress recognized concession revenues as an important source of airport capital funding since federal government grant money does not finance 100% of any "airport development project."

Id. (citations omitted).

Plaintiffs argue that this Court should follow the law as set forth in *Indianapolis Airport v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir.1984) and require the Airport to cross credit concession revenues when setting plaintiffs' rates and fees. According to the facts, the Indianapolis Airport generated approximately \$2.5 million in profits from charges to concessionaires. The *Indianapolis* court found the rates and fees unreasonable. However, only two of the judges based their decision on the AHTA.

Judges Posner and Coffey found that the overall rate structure violated the AHTA because the excessive fees charged concessions amounted to a head tax on the persons using the parking lot and concessions who, for the most part, were airline passengers. The Court set forth two factors which it said supported its decision. First, the Airport had a monopoly on air travel in the region. Apparently the Indianapolis Airport is the only one serviced by major airlines in that part of Indiana. There was no proof presented at trial before this Court on this issue. The Court can take judicial notice that Capitol City Airport in Lansing is served by major airlines and is only about one hour from Grand Rapids. Also, the Kalamazoo Airport, located in the Western part of Michigan is about an hour south of Grand Rapids, and is served by at least one major airline. In light of the lack of proof

and the existence of the Lansing and Kalamazoo Airports, the Court finds that the Airport in Grand Rapids is not in a monopoly situation.

The *Indianapolis* court stated that, in addition to proof of a monopoly, the airlines "must also show that this power is being used to impose unreasonable rates, directly on the airlines or airline passengers, and not on other entities that are neither formal nor actual parties to this case." *Id.* at 1267. The Court went on to state:

Here the second critical fact comes into play, which is that the people who use the concessions at the Indianapolis airport are, with rare exceptions, airline passengers. Although some airports adjacent to large cities (the Milwaukee airport for example) have meeting facilities that attract nonpassengers, the Indianapolis airport does not. The parking lot is used by emplaning passengers and by people picking up deplaning passengers. The car rental agencies are used by emplaning and deplaning passengers, and likewise the food stands and newsstands. This means that when the airport charges a rental fee to concessionaires it is as if it were charging a landing fee to the airlines or imposing a head tax on the passengers. If a traveler is willing to pay \$140 to fly from Indianapolis to (say) New York, it should be a matter of indifference to him whether he pays \$100 for the ticket, \$10 in head tax, and \$30 for parking; or \$120 for the ticket and \$20 for parking, with no head tax. What matters to him is the total cost that he must incur to make the flight rather than the form in which the cost is distributed among the various items that he must buy.

* * *

When concession rentals—paid ultimately by the passengers or (in the form of reduced ticket prices) the airlines—that are more than three times the cost

that the Authority itself allocates to the concessions are added to the airline user fees that also fall on either the airlines or their passengers, the result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers, and is therefore unreasonable under the state and federal statutes.

Id. at 1267-68. The Court, therefore, invalidated the rates and fees as unreasonable but did not tell the Indianapolis Airport how to fix reasonable ones.

Judge Flaum concurred with the majority opinion but based his decision on Indiana law. Judge Flaum stated that the AHTA "does not apply to fees charged to concessionaires. The majority opinion thus has expanded the reach of the statute and created regulation of the market system where Congress clearly had no intent to regulate." *Id.* at 1274.

This Court agrees with Judge Flaum's view of the AHTA. In that regard, this Court follows *Denver, supra*, and declines to follow the *Indianapolis* case. Although this case can be factually distinguished since there is no proof presented that the Airport has a monopoly, this Court agrees with both Judge Flaum and the *Denver* court that the AHTA is inapplicable to fees charged to nonairline users of the Airport. Judge Matsch in *Denver, supra*, stated:

Persons affected by the rates, rentals and charges for the restaurants, gift shops, parking lots and rental cars, include persons who are not air passengers. These accessory uses of the airport may be considered amenities for air passengers and convenient for them, but no person traveling to, from or through Stapleton on United or Continental flights is required to park in the parking lot, rent a car, eat at a restaurant or buy a magazine. Those are all individual decisions driven by individual perceptions of need and

economic values. That is not the case with respect to the use of the airport's runways, taxiways, and airplane portions of the terminal area. There, the air passenger is captive and her purse is necessarily and directly affected by Denver's charges to the airlines for those uses. Stated differently, Denver's decision to operate concessions at a profit is not an exploitation of airline passengers who have the freedom of choice to use the amenities Denver has provided.

712 F.Supp. at 838-39. Judge Matsch's reasoning is especially applicable at the Kent County International Airport. The Court finds that at trial, even plaintiffs' experts, Professor Horngren and Mr. Dompke, agreed that the Airport is basically an origin and destination airport. That means that most airline passengers using the Airport are either leaving from the Airport on the first leg of their journey or arriving at the Airport as the final destination of their journey. Therefore, if passengers wish to avoid concession prices, they can easily do so because there is no need for long waits at the Airport. If most of the passengers were just passing through the Airport to another destination, they would be a more "captive audience" for the Airport concessionaires. However, even then, the passengers can choose whether to use Airport concessions. The passengers cannot choose whether to use the runway, gates and airline ticket counters, however.

Therefore, the Court holds that the AHTA does not apply to rates and fees charged to nonairline users of the Airport. Accordingly, the Court will not order the Airport to share surplus generated by these users with plaintiffs.

The above analysis does not end the Court's review. Although the Court will not require the Airport to cross credit concession revenues when establishing plaintiffs'

rates and fees, the Court must review the rates and fees charged plaintiffs and determine whether they are reasonable. The Court finds that, except for the aircraft parking fee, the plaintiffs were charged the break-even costs for the areas they use. The record at trial showed that, in 1987 and 1988, the charges to the airlines equalled 43.3% and 40.6% respectively of the total airport expenses. In addition, the Airport's financial statements disclosed that the payments from the airlines have consistently been at approximately one-third of the total airport operating revenues. The rates and fees charged plaintiffs represented only 1.2% of the airlines' revenues generated at the Airport in 1988. If the Ordinance Rates had been applied, the airlines' payments would have equalled 1.5% of the revenues generated. It is clear to the Court that the Airport is charging plaintiffs only for their share of the operating expenses and is not generating any of its surplus revenues from rates and fees charged plaintiffs. Therefore, the Court finds that the Airport's charges to plaintiffs are reasonable in light of the benefits conferred on plaintiffs in exchange for the landing fees and terminal rental rates.

Plaintiffs argue that they should not be charged 100% of CFR expenses. This Court agrees with the *Indianapolis* court that such costs are properly allocable 100% to the airlines. 733 F.2d at 1271. The CFR costs are incurred solely because of the presence of plaintiffs and other commercial airlines at the Airport. If all the concessionaires, general aviation and fixed based operators terminated their tenancies with the Airport, the Airport would still be required to provide CFR. If all the commercial airlines ceased service at the Airport, the Airport would no longer be required to provide CFR. In addition, at trial Dean Nitz, an FAA agent, testified that it was appropriate to charge all CFR costs to the commercial airlines. Therefore, the Court finds that a charge of 100% of CFR to plaintiffs does not violate the AHTA.

Plaintiffs also argue that the aircraft parking fees should be eliminated since the airlines overnight their planes at gates which are already charged 100% to the airlines. Defendants argue that plaintiffs' choice to overnight at the gates is a business decision which should not prevent defendants' reimbursement of costs for the parking areas reserved by the Airport for overnight parking. The Court agrees that defendants should be reimbursed for the costs of providing the parking area. However, defendants should not be allowed to make a profit on this charge. The Court considers such a profit to be an indirect head charge and violative of the AHTA. Witnesses for both plaintiffs and defendants stated that the costs for the overnight parking area were \$28,000. However, the Airport's financial statements indicate that the Airport received more than \$150,000 in overnight parking charges in 1988. The Court finds this fee unreasonable and will require the Airport to recalculate this fee to result in a true break-even charge for aircraft parking.

Finally, plaintiffs argue that the undercharge to general aviation results in discrimination against plaintiffs who are interstate carriers. If the airlines were charged rates which compensated for the shortfall in general aviation fees, this Court might agree with plaintiffs. However, that is not the case. It is clear to the Court that the shortfall from general aviation users is covered by charges to concessionaires and other nonairline users of the Airport. Therefore, plaintiffs' argument must fail.

Defendants argue that, if the rates are found to be reasonable, plaintiffs must pay them the difference between the Prior Rates and the Ordinance Rates from the expiration of the prior leases on January 1, 1987. Michigan law presumes that, where a tenant holds over and the landlord accepts rent, the tenancy is continued on the same terms for another year. *Kokalis v. Whitehurst*, 334 Mich. 477, 480, 54 N.W.2d 628 (1952). However, as in *Kokalis*, no tenancy was created under the circumstances

of this case. The facts demonstrate that plaintiffs and defendants attempted to negotiate new leases but failed. That failure resulted in the KCAB imposing new rates by ordinance. These new rates were enacted by ordinance on April 1, 1988. Although these are the same rates originally proposed by defendants at the expiration of the prior leases, the Court finds that they were not a sum certain prior to April 1, 1988. Therefore, the Court will order plaintiffs to pay the KCAB the difference between the amount paid and the Ordinance Rates from April 1, 1988 to the date of the judgment to be entered by the Court with a credit to be given for the excess aircraft parking fee which has been paid. As of the date of that judgment plaintiffs must pay the KCAB at the ordinance rate as adjusted to conform the aircraft parking fee to the requirements of this opinion.

In conclusion, the Court holds that the AHTA does not require defendants to cross credit nonairline revenues when establishing rates to be charged airlines. Although the Court is troubled by such large surpluses generated by the Airport, it must acknowledge the prudent management which allows the Airport to run efficiently and with foresight thereby avoiding the necessity of seeking extra tax or bond revenues from the citizens of Kent County for expansion or improvement. The Court finds the fees charged plaintiffs to be reasonable except for the overnight parking fee which must be recalculated in accord with allocated costs.

A judgment consistent with this opinion shall issue forthwith.

JUDGMENT

In accordance with the Court's written opinion dated June 18, 1990;

The Court hereby finds for defendants on all allegations of plaintiffs' second amended complaint except for the allegation that the aircraft parking fee is unreasonable.

The Court further finds for plaintiffs on the allegation that the aircraft parking fee is unreasonable;

The Court further finds for defendants on their counterclaim;

In accordance with the findings of the Court,

IT IS ORDERED that defendants recalculate the aircraft parking fee to recover funds equal to but not greater than the costs of providing aircraft parking area;

IT IS FURTHER ORDERED that plaintiffs are to pay defendants the difference between the Prior Rates and the Ordinance Rates for the period of time from April 1, 1988 to the date of this Judgment, with an adjustment for the overpayment of the aircraft parking fee;

IT IS FURTHER ORDERED that the plaintiffs must pay the Ordinance Rates with the recalculation for the aircraft parking fee as of the date of this judgment.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

File No. G88-243 CA

HON. ROBERT HOLMES BELL

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
PIEDMONT AVIATION, INC., COMAIR, INC., FISCHER
BROS. AVIATION, INC., d/b/a MIDWAY COMMUTER,
USAIR, INC., AMERICAN AIRLINES, INC., and UNITED
AIR LINES, INC.,
Plaintiffs,

v

COUNTY OF KENT, MICHIGAN, and THE KENT COUNTY
AERONAUTICS BOARD,
Defendants.

OPINION OF THE COURT

Now before the Court are cross-motions for summary judgment. Defendants renew their motions for summary judgment and to dismiss claiming that there is no federal question involved and the Court does not have jurisdiction over this case. Plaintiffs renew their motion for partial summary judgment claiming that the proofs are now undisputed that the rates used by defendants are unreasonable.

The Kent County International Airport, the plaintiff Airlines, and other nonairline concessionaires are essentially related to each other as landlord and tenants. The Airport establishes rates and user fees for the Airlines and nonairline concessions. Generally, airports formulate rates and fees for airline tenants using essentially one of

two methods, either a compensatory or a residual cost method.

The Kent County Aeronautics Board (KCAB) has used a compensatory method, known as the Buckley method, since 1968. The KCAB's application of the Buckley compensatory method produced rates with which the plaintiff Airlines had apparently agreed for several terms since 1968. However, in 1986 the Airport issued a new rate study propounding rates effective January 1, 1987, which the Airlines now object to. They challenge certain landing fees, rental rates and aircraft parking fees as unreasonable. The rates and fees established in 1987 and 1984 differ significantly. The landing fee increased from \$.50 to \$.7021 per thousand pounds; the overnight parking fee decreased from \$.40 to \$.32; and the terminal space rental rates also increased.

Plaintiffs, in their Second Amended Complaint, state that defendants have violated the Commerce Clause of the United States Constitution (U.S. Const., Art. I, § 8, cl. 3), the Anti-Head Tax Act (49 U.S.C. § 1513) (AHTA), and the Airport and Airway Improvement Act (49 U.S.C. § 2210) (AAIA). Defendants claim that there is no private right of action under either of the statutes and that the Commerce Clause does not apply in this case. Defendants argue that the proper forum for this litigation is the Federal Aviation Administration (FAA).

Defendants first argue that there is no cause of action under the AHTA because the landing and rent fees are not head taxes. Although not expressly stated, defendants are in reality arguing that there is no private right of action and that any complaints by plaintiffs should be addressed to the Secretary of the Department of Transportation. In support of this position defendants cite from an amicus curiae brief from the Secretary of DOT and from *New England Legal Foundation v. Mass. Port Authority*, 883 F.2d 157 (1st Cir. 1989).

In *New England*, the court found that landing fees were not head taxes under the AHTA. This case appears to be standing alone for that proposition. The statute includes "landing fees" in those fees required to be "reasonable." 49 U.S.C. § 1513(b) states:

(b) Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

The plain language of the statute includes landing fees in the charges that must be reasonable. If there is a private right of action under this statute, then it does not seem appropriate to say that landing fees and rental charges are somehow exempt from scrutiny. The court in *New England* did not overrule its previous ruling that there is a private right of action under the AHTA.

In *Interface Group, Inc. v. Mass. Port Authority*, 816 F.2d 9 (1st Cir. 1987), the court found that there is a private right of action under the AHTA. The court relied on the four factors found in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). After analyzing all of the factors, the court concluded that there was an implied private right of action under the AHTA. 816 F.2d at 16. In addition, to *Interface*, the court in *Niagara Frontier T.A. v. Eastern Airlines*, 658 F. Supp. 247, 250-251 (W.D.N.Y. 1987) set forth a thorough analysis of the basis for an implied private right of action using the *Cort* factors. The Court in *Rocky Mountain Airways, Inc. v. Pitkin County*, 674 F.Supp. 312 (D.Colo.

1987) also found an implied private right of action under the AHTA.

In addition to the above cases which have directly ruled on the issue of whether there is an implied right of action under the AHTA, three cases have issued rulings under the AHTA without addressing this issue. Those cases are *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984); *Island Aviation, Inc. v. Guam Airport Authority*, 562 F. Supp. 951 (D.Guam 1982); *American Airlines, Inc. v. City of Philadelphia*, 414 F. Supp. 1226 (E.D.Pa. 1976).

This Court agrees with the reasoning of the Court in *Niagara Frontier* and finds that it has jurisdiction under the Anti-Head Tax Act because the airlines have an implied private right of action under the statute.

Defendants next argue that there is no private right of action under the Airport and Airway Improvement Act. 49 U.S.C. § 2210(a) (1) states:

As a condition precedent to approval of an airport development project, contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without just discrimination, including the requirement that (A) each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport and which

utilize similar facilities, subject to reasonable classifications such as tenants or nontenants, and signatory carriers and nonsignatory carriers, and such classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status, . . .

The courts have consistently found no implied private right of action under the AAIA. *New England Legal Foundation, supra*, 883 F.2d at 168-70; *Interface Group, supra*, 816 F.2d at 15; *Niagara Frontier, supra*, 658 F. Supp. at 249. There are no cases in which a court found an implied private right of action under the AAIA.

In response, plaintiffs argue that, even if there is no private right of action under the AAIA, plaintiffs can use that statute as a shield under the Supremacy Clause, U.S. Const., Art. 6, cl. 2. Plaintiffs cite *Western Airlines v. Port Authority of New York and New Jersey*, 817 F.2d 222 (2d Cir. 1987) in support of this proposition. However, in that case, the court found that the local regulation was not preempted by the statute in question, 49 U.S.C. § 1305. Plaintiffs next cite *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547—(1973). In that case, the Court found that Congress had completely preempted the issue of noise control in and around airports. Under the AAIA, it is clear that Congress left the determination of rates to local regulation which could be overseen by the Secretary of DOT. Finally, plaintiffs cite *Aloha Airlines, Inc. v. Hawaii*, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983). In *Aloha Airlines*, the Court found that Hawaii's tax on the gross income of the airlines was directly preempted by the section of the AHTA which prohibits taxes on gross receipts (49 U.S.C. § 1513(a)). In that case there was a direct conflict between the federal statute and the local statute. In the instant case, the statute expressly permits the local government to impose reason-

able rates on the airlines. The Court finds that there is no private cause of action under the AAIA and that that statute cannot be used as a shield under the Supremacy Clause.

Finally, defendants argue that there is no cause of action under the Interstate Commerce Clause of the U.S. Constitution because Congress has already acted under the AHTA. The United States Supreme Court has found that courts should only undertake a Commerce Clause review of a tax or regulation if Congress has not acted in the area. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21, 40 (1982). See, *Indianapolis Airport*, *supra*, 733 F.2d at 1266. The court in *Indianapolis Airport* held that, where the issue was the reasonableness of the rates under the AHTA, "the only question is whether they are consistent with the congressional policy." 733 F.2d at 1266. The Court finds that there is no Commerce Clause action stated in this case.

Plaintiffs renew their motion for summary judgment alleging that there are now sufficient undisputed facts in the record to allow the court to grant partial summary judgment to plaintiffs. Plaintiffs state that the undisputed facts presented should allow the Court to rule that the ratemaking methodology used by KCAB is improper. Defendants, of course, vociferously argue that the facts do not support plaintiffs' arguments and that there is no federal jurisdiction in this case. After reviewing the briefs and hearing oral arguments, the Court finds that the material facts are disputed and will deny plaintiffs' motion for partial summary judgment.

An order consistent with this opinion will issue forthwith.

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
United States District Judge

Dated: January 19, 1990

APPENDIX D

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

G88-243-CA

HON. ROBERT HOLMES BELL

NORTHWEST AIRLINES, INC.; SIMMONS AIRLINES, INC.;
PIEDMONT AVIATION, INC.; COMAIR, INC.; MIDWAY AIR-
LINES (1987), INC.; formerly, FISCHER BROS. AVIA-
TION, INC.; USAIR, INC.; AMERICAN AIRLINES, INC.,
and UNITED AIRLINES, INC.,

Plaintiffs,

v.

COUNTY OF KENT, MICHIGAN; THE KENT COUNTY BOARD
OF AERONAUTICS; and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Defendants.

OPINION

Before this Court are cross motions for summary judgment. Plaintiffs Airlines move for partial summary judgment on count one of their complaint seeking a declaratory judgment alleging that the rates and charges adopted by the Kent County Aeronautics Board ("KCAB") on March 10, 1988, for the Kent County International Airport ("Airport") are unreasonable, void, and unenforceable under the Anti-Head Tax Act ("AHTA"), 49 U.S.C. § 1513, and the Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. § 2210; further, the rates unreasonably burden interstate commerce violating the Commerce Clause of the United States Constitution, art. 1,

§ 8, cl. 3, and exceed rates permitted by M.C.L. § 259.133 (g). Plaintiff Airlines also move for summary judgment on defendants' counterclaim for payment of the new higher rates. Defendant Kent County ("Kent") and the KCAB move for summary judgment to dismiss plaintiff Airlines' complaint alleging the illegality of the methodology used by the KCAB to determine its rates. Pursuant to a F.R.Civ.P. 16 status conference held on October 17, 1988, the sole issue currently before this Court is whether the *methodology* used to establish user fees at the Airport is illegal, unreasonable, and void.

BACKGROUND

The Kent County International Airport, the plaintiff Airlines, and other nonairline concessionaires are essentially related to each other as landlord and tenants. The Airport establishes rental rates and user fees for the Airlines and nonairline concessions. Generally airports formulate rates and fees for *airline* tenants using essentially one of two methods, either a *compensatory* or a *residual cost* method. Compensatory methods formulate rates and fees for airline tenants based on the actual cost of the particular facility and specific service used. Residual cost methods formulate rates and fees for airline tenants based on the total cost of operation of the airport. The crucial difference between these two methods, for purposes of this analysis, is that a compensatory methodology typically ignores, and does not necessarily reflect, the practical and economic interdependencies between the various airport revenue centers in establishing rates and fees, whereas a residual cost method recognizes such interdependencies in setting rates and cross-credits revenues generated by one tenant among contributing tenants.

The KCAB has used a compensatory method known as the Buckley methodology since 1968.¹ As used by the

¹ This compensatory method for determining user fees and rental rates was named after James E. Buckley (d. 1981), an airport con-

KCAB, the Buckley method attempts to assess user fees and rental rates only for the airline tenants' usage of the facilities, services, and certain other reasonably allocable operating costs (overhead, maintenance, and administration). The Buckley method does not base its cost analysis on the replacement cost value or the current market value of the land or facilities. Rather, it uses the historic actual cost of the assets. The cost basis does not include the cost to the Airport for various nonairline services or other tenants, such as the United States government weather service, customs offices, FAA offices, the parking lot, various concessions (car rental facilities, restaurant, gift shop, amusements), or the Airport motel. Further, the cost basis does not include taxes. However, KCAB also deducts all state and federal funding from the cost basis.

The KCAB's application of the Buckley compensatory method produced rates to which the plaintiff Airlines had agreed over several terms since 1968. However, in 1986 the Airport issued a new rate study propounding rates effective January 1, 1987, to which the Airlines now object as to both the legality of the method and the reasonableness of the resulting rates. They challenge certain landing fees, rental rates, and aircraft parking fees as unreasonable. The rates and fees established in 1987 and 1984 differ. The landing fees increased from \$.50 to \$.7021 per thousand pounds; the overnight parking fee decreased from \$.40 to \$.32; and the terminal space rental rates also increased.

Again, the issue before this Court is whether the Buckley compensatory methodology used in determining rates and fees for the Airport is illegal, unreasonable, or void. All other issues are reserved for trial.

sultant, who assisted in developing the Kent County International Airport. Buckley articulated his approach in "General Principles With Respect to Airport Rate Making" (Defendants' Exhibit 1)

Resolution of this dispute raises several legal issues. The following analysis assumes that plaintiff Airlines have the burden to prove the unreasonableness and illegality of the Airport's compensatory method and that the fees and rates of KCAB are presumed valid. *Evansville-Vandenburg Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707, 31 L. Ed. 2d 620 (1972) *Swift v. United States*, 343 U.S. 373, 96 L. Ed. 1008 (1962); *United States v. Jones*, 336 U.S. 641, 93 L. Ed. 938 (1949); *New Orleans Public Service, Inc. v. City of New Orleans*, 281 U.S. 682, 74 L. Ed. 1115 (1930); *Southern Airways, Inc. v. City of Atlanta*, 428 F. Supp. 1010, 1020 (N.D. Ga. 1977); *Raleigh-Durham Airport Authority v. Delta Airlines*, 429 F. Supp. 1069, 1082 (D.N.C. 1976); *Patchak v. Township of Lansing*, 361 Mich. 489 (1960).

Plaintiff Airlines attack the rate method for several reasons. Fundamentally they claim that the KCAB's use of the Buckley compensatory method of rate making violates the Anti-Head Tax Act ("AHTA") because it produces rates that are unreasonable. Airlines also argue that the method is illegal because it imposes rates and fees on the Airlines, and indirectly on passengers, that result in exorbitant profits for the Airport that far exceed the costs that the Airlines impose on the Airport. Further, plaintiff Airlines contend that this method is inherently improper and unreasonable because surplus nonairline concession revenues are considered as Airport profits and not cross-credited to the Airlines in establishing their rates and fees. Also, the KCAB's application of the method discriminates against the Airlines in favor of private general aviation users. Private general aviation users are charged rates and fees less than cost attributed to them, whereas the Airlines are charged more. However, the crux of this dispute is, the Airlines state, "under the Ordinance Rates, the Airport will obtain from such sources sufficient revenue to not only pay the operating expenses and to underwrite the capital borrowing . . .

but, in 1988 will obtain an additional positive cash flow of \$3,395,934." (Airlines brief filed February 9, 1988, at 26).

Plaintiff Airlines maintain that the Buckley compensatory method violates the AHTA. In 1973 Congress passed the Airport Development Acceleration Act ("ADAA") Pub. L. 93-44, 49 U.S.C. § 2210 *et seq.*, to increase federal funding of Airport development. Congress included the AHTA as part of the ADAA. Specifically the AHTA prohibited direct or indirect "head taxes" on airline passengers and overruled the holding in *Evansville-Vandenburg Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707, 31 L. Ed. 2d 620 (1972), which permitted airport taxes and levies on persons travelling in "air commerce." Since air travellers were subject to an 8% federal ticket excise tax, Congress intended to prohibit any similar state tax on air travellers. See S. Rep. No. 12, 93 Cong., 1st Sess. 1, reprinted in 1973 U.S. Code Cong. & Admin. News 1434, 1446. *Aloha Airlines v. Director of Taxation of Hawaii*, 474 U.S. 7 (1983); *Salem Transportation Company v. Port Authority of New York and New Jersey*, 711 F. Supp. 254, 257 (S.D.N.Y. 1985).

The AHTA in part provides:

§ 1513(a)

No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons travelling in air commerce or on the carriage of persons travelling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.

§ 1513(b)

[N]othing in this section shall prohibit a State (or political subdivision thereof . . .) . . . from levying or collecting reasonable rental charges, landing fees,

and other service charges from aircraft operators for the use of airport facilities.

The plain reading of § 1513(a) applies only to persons or the carriage of persons traveling in air commerce or the sale of air transportation or the gross receipts therefrom. The statute clearly focuses on *air commerce*. The Federal Aviation Act, 49 U.S.C. § 1301(4), (23), and (24) define the terms: "air commerce," "interstate air commerce," and "interstate air transportation." "Air commerce" refers to "operation or navigation of aircraft"; "interstate air commerce" and "interstate air transportation" refer to "carriage by aircraft or persons or property." The statute simply does not reference nonairline concession activity. Further, § 1513(b) does permit airport authorities to "levy and collect *reasonable* rental charges, landing fees, and other service charges from *aircraft operators* for the use of airport facilities." Facially non-airline concession revenues are not within the scope of the AHTA. Accordingly, the AHTA does not support the Airlines insofar as they seek to require the Airport to cross credit nonairline concession revenues to the Airlines for purposes of establishing their rates and fees.

Historically large "hub airports" generated sufficient revenues to fund development. The legislative history of the ADAA, of which the AHTA is a part, acknowledged that airports retained and used nonairline concession revenues that exceeded expenses. Congress contemplated that profitable airports would use such funds for local airport expansion and other capital projects. Recognizing this, Congress even raised the percentage of federal funding to smaller airports which did not generate surplus revenues, 49 U.S.C. § 1717(a).² Thus, Congress implicitly approved

² S. Rep. No. 12, *supra*, provides, referring to hub airports: [T]he large hubs appear for the most part to be self-sustaining. In many cases these airports are actually profitable. Fees paid by the airlines for landing and for space rental and fees obtained from concessionaires for parking, restaurants, shops, etc., are adequate

the airports' practice of generating "surplus" airline and nonairline concession revenues. The AHTA's tacit approval of this common airport policy at least presumes its legality.

In the Airport and Airway Improvement Act of 1982 (AAIA), Pub. L. 97-248, Congress again tacitly approved the practice of airports generating at least limited "surplus" revenues by prescribing the use of such revenues for airports receiving federal project grants. Section 511 (12) of the AAIA requires airports receiving development grants to agree to use "all revenues generated by the airport . . . for the capital or operating cost of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual transportation of passengers or property."

Plaintiffs also assert that the rates and fees of the KCAB violate the Michigan Aeronautics Code (MAC). MCL § 259.133 broadly authorizes political subdivisions of the state to construct and operate aeronautical facilities, and also to determine charges, rents, and fees.³ It does not prescribe or proscribe any particular methodology. It merely requires that fees be equal and uniform for the same type of facilities or services provided, and that the fees do not deprive the public of rightful, equal, and uniform use of the facilities. Another provision, MCL

to cover both the operational expenses of the airport and to underwrite the capital investment borrowing required. *See also*, H.R. Rep. No. 157, 93d Cong., 1st Sess. 7 (1973).

³ Political subdivisions may also issue revenue bonds to finance the construction of aeronautical facilities. MCL § 259.131. The powers accorded to political subdivisions is broader than that accorded to the Michigan Aeronautics Commission which establishes charges for airports run by the State of Michigan. The Commission's power is qualified by the phrase "reasonable and uniform," MCL § 259.106. This provision is similar to the Indiana Statute under which the *Indianapolis* case was decided, Ind. Code § 8-22-3-11.

§ 141.129, prohibits review by a state agency of a political subdivision's rates, charges, and fees when revenue bonds finance airport construction. This deference suggests that political subdivisions possess broad discretion in establishing rates, charges, fees, and, presumably, in selecting a rate making methodology.

Plaintiffs also claim that the Airport used the Buckley methodology to establish rates and fees that violate the Commerce Clause of the United States Constitution, art. 1, § 8, cl. 3. Under *Evansville-Vanderburgh Airport Authority, supra*, 405 U.S. 707 and *American Airlines v. Massachusetts Port Authority*, 560 F.2d 1036 (1st Cir. 1977), a rate or fee may not be "excessive in relation to costs incurred by the taxing authorities" or it may constitute an unreasonable burden on interstate commerce. Although the particular rates and fees may prove to unreasonably burden interstate commerce, the Buckley compensatory method, per se, is not readily susceptible to such evaluation under the Commerce Clause at this time.

Review of the relevant case law indicates that no single mandated methodology for establishing airport rates and fees exists. Two cases, *Raleigh-Durham, supra*, and *Indianapolis Airport, supra*, are particularly significant in analyzing this case. Although neither is binding upon this Court, the reasoning in each is instructive. In *Raleigh-Durham*, at 1079,⁴ the court found:

⁴ In the *Raleigh-Durham* case the airport operated on a compensatory or "cost of services system" in which each cost center or operating area "paid its own way." The airport had two operating areas: the "airside" and the "landside." The court described this approach as a "two cash register" system in which required the airside and landside "to support themselves independently of the profits or losses of the other. The court decided the case solely under a state statute requiring reasonable charges. The central issue in the *Raleigh-Durham* case was whether "the airport should operate under a one cash register system in which credit for landside profits . . . should be attributed to airside operations thus reducing [the airlines'] obligation for landing fees. *Supra*, 1078-79.

[A] two cash register system . . . is a reasonable method of allocating cost and calculating airport landing fees, if it is fairly and regularly applied in all cases. This is not to say that such a method is the only reasonable procedure for airport calculation of landing fees. Rather, it is [a] useful and reasonable tool whose proper application can produce a useful and reasonable result.

Nevertheless, in *Indianapolis Airport* the majority opinion of the court states that the multiple cash register approach used by the airport authority was an "invalid method of calculating airline landing fees."⁵ The court reasons that the "vice" of the method "is that, by a combination of airline user fees and concession rentals, the airport authority has imposed on the airlines and their passengers a cost for the use of the airport that greatly exceeds a reasonable estimate of the costs that the airlines impose on the airport." However, the minority opinion criticizes the majority opinion's invalidation of the method concluding that the airport authority can recognize "as

⁵ The court explains its determination:

The Authority used an invalid method of calculating airline landing fees and must therefore go back to the drawing board. But unless there were a single valid method, we could not tell the Authority what fees it must charge; and no one says there is . . . We therefore do not hold that the Authority must use the "single cash register" approach, in which the entire airport is treated as a single cost center, rather than the "multiple cash register" approach, illustrated by this case, in which the airport is divided into different revenue-producing centers each of which must pay its own way. The vice of the ordinance, at least so far as the case before us is concerned, is not that it makes airlines pay the costs allocable to them, or even that it makes concessionaires pay so much more than the costs allocable to them (for no concessionaires are parties to this suit); it is that, by a combination of airline user fees and concession rentals, the airport authority has imposed on the airlines and their passengers a cost for the use of the airport that greatly exceeds a reasonable estimate of the costs that the airlines impose on the airport.

many cost centers as it deems prudent; but it must allocate the costs among them, and among the users of a cost center, fairly." *Indianapolis Airport*, at 1277.

From a review of both *Indianapolis Airport* (both majority and minority opinion) and *Raleigh-Durham* it appears that the operative test of a method's validity is whether it produces reasonable rates. And the operative test of whether a rate is reasonable assesses the degree by which rates and fees for facilities and services exceed an airport's cost in providing the facilities and services (*Indianapolis Airport*) and the consistency by which a method is applied (*Raleigh-Durham*). As a general rule, it appears that the rates and fees charged to the different classes of users must reflect the Airport's costs of providing the benefits that each receives. *Indianapolis Airport*, 1270-71, 1276-77; *Raleigh-Durham*, 1079.

Further, both cases recognize the reality of economic interdependencies among airport users in assessing the reasonableness of rates and fees. However, recognition of the interdependent character of airport operations does not preclude use of a compensatory methodology or multiple cash register approach; nor does it prescribe the use of a residual methodology or single cash register approach. The standards used by these two representative cases merely require consistent application of a method that does not result in rates and fees that greatly exceed the cost to the airport of the benefit conferred. *Indianapolis Airport*, 1270-71, 1277; *Raleigh-Durham*, at 1089. For example, in a residual methodology nonairline revenues may be cross-credited to the airlines for purposes of establishing their cost basis. This practice is one technique by which an airport authority allocates to the non-airline concessions the cost to the airport of providing a flow of customers. In a compensatory methodology the allocation of cost to a nonairline concession cost center might not accurately reflect the *actual* cost to the airport authority of providing the benefit, i.e., a flow of customers

to the nonairline concession. The failure of a *rate study* to accurately and realistically assess the actual cost to the airport authority or providing the various benefits to different airport users may underestimate the actual cost to the airport in providing specific benefits to one airport user and result in rates and fees to other airport users that greatly exceed the airport's cost in providing the benefit. Thus, recognition of practical and economic interdependencies among airport users in formulating rates and fees (as required by *Raleigh-Durham* and *Indianapolis Airport*) does not require cross-crediting revenues between cost centers. However, it does require realistic determination and accurate allocation of costs.

CONCLUSION

After review of the Buckley compensatory method as presented in the brief, documents, and record of this case, this Court cannot conclude that the Buckley compensatory method, per se, is illegal, invalid, or unreasonable. The method could be used to formulate reasonable rates and fees. However, this Court also recognizes that the KCAB could misapply the method, as it may have, to formulate unreasonable rates and fees. This Court also opines that insofar the KCAB ignores the existence of interdependencies among airport users, the KCAB increases the risk of improperly formulating rates and fees that generate revenues that "greatly exceed" the Airport's legitimate costs in providing benefits (facilities, services, and capital improvements) to the Airlines.

FURTHER RESOLUTION OF THIS DISPUTE

In *Indianapolis Airport*, the court identified the role of courts in resolving disputes over airport rates and fees:

No agency has regulatory authority over the rate practices of the Indianapolis Airport Authority; instead the duty of regulation falls to the courts in the enforcement of the state and federal statutes forbid-

ding unreasonable rates. But this just means that we must imagine ourselves in the role of a regulatory agency . . . that is charged with preventing airport authorities from setting exorbitant rates to airlines or their passengers. [at 1268-69] . . . [T]he powers of a federal court in regulating rates are more limited than those of an administrative agency. We can invalidate an unreasonable rate, but we cannot fix the reasonable rate; that is a legislative or administrative rather than a judicial function. [at 1270] *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362, 397-98, 14 S. Ct. 1047, 1054, 38 L. Ed. 1014 (1894).

Indianapolis Airport, at 1268-70. This Court recognizes that the Airport and Airlines maintain a continuing relationship with periodic adjustment in rates and fees. This could result in recurring, rather than definitive, litigation over time to judicially determine the reasonableness of any particular rate or fee. This may well be the properly occasional role of the courts in airport rate and fee disputes. However, in the present case, assuming the limited range of judicially appropriate action as stated in *Indianapolis Airport*, a simple invalidation of the Airport's rate as unreasonable (either excessively formulated or inconsistently derived) may not even definitively resolve the current dispute. The Airport would formulate another rate and fee schedule and the Airline again could challenge it as unreasonable. This is an unhappy prospect for the district court upon which "the duty of regulation falls." The possibility of protracted and repeated judicial determinations recommends using methods of alternative dispute resolution, such as mediation, arbitration, or the appointment of a special master.

The determination of whether the Airport's rates and fees are reasonable or unreasonable in this case involves exceptional conditions for judicial analysis. Although this Court could competently determine the issue of the reasonableness of the rates and fees, the particular expertise of

a special master in evaluating these especially complicated matters of cost accounting would assist the court in arriving at a correct determination of the dispute. This Court observes that appointment of a special master is an exceptional judicial approach and in nonjury actions shall be done "only upon showing that some exceptional condition requires it." F.R.Civ.P. 53(b). Further, this Court recognizes as a requisite "exceptional condition" that resolution of this dispute involves assessment of conflicting and sophisticated cost accounting theories. To this end, this Court requires the parties to respond to this Court's proposed reference of this matter to mediation, arbitration, or a special master.

/s/ Robert Holmes Bell
HON. ROBERT HOLMES BELL
United States District Judge

Dated: June 22, 1989

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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORTHWEST AIRLINES, INC.; SIMMONS AIRLINES, INC.;
PIEDMONT AVIATION, INC.; COMMAIR, INC.; MIDWAY
AIRLINES (1987), INC., FORMERLY KNOWN AS FISCHER
BROTHERS AVIATION, INC.; UNITED AIRLINES, INC.,
Plaintiffs-Appellants,

v.

COUNTY OF KENT, MICHIGAN; THE KENT COUNTY BOARD
OF AERONAUTICS; THE KENT COUNTY DEPARTMENT OF
AERONAUTICS,
Defendants-Appellees.

ORDER

[Filed Apr. 16, 1992]

Before: KENNEDY and NELSON, Circuit Judges; and
CONTIE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the peti-

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tion were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 90-1811/2117

NORTHWEST AIRLINES, INC.

v.

COUNTY OF KENT, MICHIGAN

[Filed May 7, 1992]

Chief Judge Merritt, dissenting from failure to grant en banc hearing. The majority opinion, as Judge Nelson points out in dissent, creates a direct conflict with the Seventh Circuit on the question of allocating the costs of airport firefighting and rescue services. This is an important issue. Most major airports allocate these costs, which are substantial, to the airlines. The effect of our opinion is to hold invalid the cost allocation system at airports across the country. There is a great need for uniformity here. Before we require the Supreme Court to resolve this conflict in the circuits, we should hear the case *en banc*.

The Seventh Circuit in *Indianapolis Airport v. American Airlines*, 733 F.2d 1262, 1271 (1984), said:

The first [of the airline's contentions] is that the ordinance should have allocated the costs of firefighting services in proportion to the number of fires experienced by each class of users of the airport's

facilities over some reasonable period of time rather than mainly to the airlines. We disagree. The airport has elaborate firefighting facilities not in order to enable it to respond to a grease fire in a hamburger stand or a car fire in the parking lot but to protect the airlines and their passengers should a plane catch on fire in a crash or other accident. Airport costs that would not be avoided if a particular class of users stopped using the airport (*i.e.*, the concessionaires) are not costs imposed on the airport by those users, and therefore are not properly allocable to them. Cf. *Illinois v. ICC*, 722 F.2d 1341, 1346 (7th Cir. 1983). Thus the bulk of the firefighting costs are properly allocable to the airlines.

Our Court's opinion takes this authority away from the airports in conflict with this reasoning. This is a seriously mistaken view. As a matter of policy, most regional airports want to keep some general aviation on the field for a variety of reasons. The general aviation fleet, the number of new pilots and other similar statistics are in serious decline. Our court's decision which attempts to control the allocation of costs at such airports will make the matter worse and hasten what is already a very serious problem for the future of aviation.

AUG 12 1992

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC., USAIR,
INC., AMERICAN AIRLINES, INC., and
UNITED AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY
BOARD OF AERONAUTICS, and THE KENT COUNTY
DEPARTMENT OF AERONAUTICS,

Respondents.

**Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit**

**BRIEF OF ALL RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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PARTIES TO THE PROCEEDINGS

The County of Kent, Michigan, the Kent County Board of Aeronautics and the Kent County Department of Aeronautics were Defendants in the District Court and Appellees in the Court of Appeals for the Sixth Circuit. The County of Kent, Michigan has also been referred to as "Kent County" throughout these proceedings. Kent County owns the Kent County International Airport that is managed by the Kent County Department of Aeronautics and by the Kent County Board of Aeronautics. Throughout these proceedings the Respondents, the Kent County Board of Aeronautics and the Kent County Department of Aeronautics, have been referred to as the "Airport."

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I. COUNTERSTATEMENT OF THE CASE

This case has always¹ involved efforts by the Airlines to impose a new business relationship on this Airport in order to obtain a share of, or a credit for, the Airport revenues received from local citizens who use Airport concessions, such as the restaurant, parking lot, and car rental agencies. Thus, in light of the factual void in the Airlines' Petition, the Airport has deemed it important to highlight the public nature of an airport, the two primary types of airport rate-making methodologies, the historic manner in which these Airport rates have been consistently developed by this Airport, and the current financial status of this Airport.

¹ At footnote 11 on page 17 of the Airlines' Petition it is asserted that "the Airlines have never argued . . . that concession fees are regulated by AHTA." This assertion is contradicted on the very next page of their Petition (p 18), where the Airlines state, . . . "even if the Sixth Circuit was right to deny the AHTA claim on the ground that the statute is inapplicable to concession fees – a point with which the airlines strongly disagree . . . " (Emphasis added). Moreover, as this record clearly indicates, the Airlines have always sought "cross-crediting" or "application" of concession revenues to reduce the Airport charges to the Airlines. Earlier both lower courts recognized, discussed, and rejected the now disguised efforts of the Airlines to have concession revenue credits applied so as to reduce their charges (See Appendix pages 2a, 10a, 20a, 27a, 30a, 31a, 32a, 50a, and 52a). The cost allocation questions now argued are simply a thinly veiled attempt to obtain some type of crediting of concession revenues. These cost allocation fact questions were properly resolved.

This is a fact-intensive, cost allocation rate case, heavily dependent upon the fact findings² of the District Court.

A. Undisputed Facts as to Airport History, Airport Financial Status and Use of Airport Funds.

This Airport is regarded as a small hub airport serving the southwestern Michigan area. Most of the passengers and other Airport patrons at this Airport are southwestern Michigan citizens who constitute the primary consumers generating the concession revenues that the Airlines now seek to share. (2a)

Under the cost allocation methodology used by the Airport, the Airport is a landlord, and all Airport users, including the Airlines, are tenants. (3a; 26a) The fundamental purpose of the Airport is to serve the air transportation needs of the local community. The uncontroverted trial testimony established that the need for the airport, and the resulting presence of the airlines, is derived from the demand of local residents for air transportation. In other words, the community creates the need which results in the presence of the airlines. This is known as "derived" or "primary" demand. Consequently, contrary to their arguments, the Airlines do not create the economic, social, personal or recreational reasons which result in a "flow of passengers" to and from the community.

Kent County owns the Airport. Over the years Kent County and its citizens have advanced \$5,532,112.08 (not including interest) from non-airport sources for the creation and expansion of this Airport. There has not been any reimbursement to Kent County. As of December 31,

² Reference to earlier Opinions rendered in this case will be to the pages of the Appendix attached to the Airlines' Petition utilizing an "a" page reference. The Sixth Circuit Court of Appeals Opinion is at 1a to 22a. The District Court Final Opinion is at 23a to 40a.

1991 the Airport public financial statements reflect that continuing, airport capital expenditures, as specifically projected at trial, have now reduced retained earnings ("surplus") to \$5,940,756.00. In short, as of this date, the Airport current total retained earnings approximate the Airport's historic unreimbursed advances by Kent County.

The Trial Court properly recognized that the Airport's methodology was used as a tool "to determine the break-even costs for the Airlines' use of the Airport." (28a) The District Court further found that the terminal rental rates and landing fees corresponded with these "break-even costs." (37a)

The Airlines mistakenly argue (p 6) that the Airport has a surplus so far in excess of any possible, future needs that somehow this surplus renders these charges unreasonable. Significantly the District Court found that no part of the Airport's accumulated surplus is derived from the Airline charges and that all Airline charges are based on a percentage allocation of historic costs incurred, specifically stating:

It is clear to the Court that the Airport is charging plaintiffs only for their share of the operating expenses and is not generating any of its surplus revenues from rates and fees charged plaintiffs. Therefore, the Court finds that the Airport's charges to plaintiffs are reasonable in light of the benefits conferred on plaintiffs in exchange for the landing fees and terminal rental rates. (37a)

Moreover, it was shown that the Airport's capital needs include improvements under the FAA National Plan of Integrated Airport Systems ("NPIAS") estimated to cost \$19,590,000.00 from 1990 to 1995, and a total of \$40,260,000.00 from 1990 through 2000. Another category of projected Airport improvements totaling an additional \$10,965,000.00 was purely local in nature (*i.e.*, not encompassed in the NPIAS) and is to be paid for entirely out of local funds.

As undisputed trial testimony indicated would happen, since the 1990 trial the Airport has utilized considerable portions of its December 31, 1989 retained surplus of \$9,000,000.00 for its numerous, publicly announced expansion projects, which have been included in the NPIAS and/or in the Airport's public Master Plan. This surplus was reduced to \$5,940,756.00 as of December 31, 1991, as indicated in airport public financial statements and in "PFC" (passenger facility charge) information made available to the FAA and to Petitioners. The Airport surplus that the Airlines now seek to share has been generated from community funds and from the non-airline concession revenues. It can only be used for Airport purposes. Under these circumstances, the creation and utilization of this surplus for "Airport-only" purposes is not a legal or factual matter of exceptional national importance to justify the issuance of a Writ of Certiorari. Under the Airport and Airway Improvement Act of 1982 ("AAIA") and related FAA Grant Assurances, all revenues generated by the Airport must remain "on the Airport" for Airport capital or operating costs. 49 U.S.C. App. 2210(a)(12). Such revenues have been so used and have never been made available to Kent County.

At trial there was no evidence of Airport violations of FAA standards, Cost Accounting Standards Board ("CASB") rules, nor of Generally Accepted Accounting Principles ("GAAP") as to any Airline charges.

B. Two Primary Types of Airport Rate-Making Methodologies are Used by Airports.

In their operations at the Airport, the Airlines utilize significant landing areas, necessary clear zone and safety areas, aircraft ramp and apron areas, overnight aircraft parking areas, and space in different portions of the passenger terminal building. At issue in this case is whether the cost allocation methodology chosen and applied by this Airport, as landlord, is unreasonable to

determine the user fees and rental rates to be charged to the Airlines, as tenants.

There are two primary airport industry methodologies for the establishment of reasonable airline tenant user rates. The methodology consistently implemented by the Airport since 1968 is known as a "compensatory" or "cost of service" methodology (27a). This methodology is based entirely upon cost allocation principles, and not upon revenue-sharing special lease agreements with the Airlines. The Airport's methodology has always been based upon specific percentage allocations of historic costs incurred, rather than upon any subjective evaluation of the "benefits received" by the Airport tenants. Under the compensatory methodology, the Airport bears the entire risk of meeting its expenses and obtaining funds for expansion. This accounting methodology was accurately summarized and approved in the Sixth Circuit Court of Appeals Opinion (3a) and in the District Court Opinion (27a).

The other airport rate-making methodology is a "residual" methodology under which the airlines (by written lease agreements) share in the airport's risks (*i.e.*, the possibility of profits and losses) on a specific agreed-upon basis and also share in airport management decisions with reference to such business risks. This is not a typical landlord/tenant relationship, but more of a partnership where the airlines assume the risk of guaranteeing the break-even costs of the airport for operations and development. If there is a shortfall in non-airline revenue at the Airport, the Airlines are contractually obligated to cover this shortfall. Residual-type leases require special Airport/Airline voluntary lease provisions which detail the risk/revenue sharing principles that are inherent in a residual methodology. In such residual leases the Airlines customarily control their Airport financial risks by requiring "majority in interest" ("MII") clauses which require that a majority of the airlines agree to the amount and type of airport capital improvements.

Now that this Airport has successfully established its concession operations the Airlines are attempting, by litigation, to impose a "no risk residual" methodology upon this Airport. The Airport has never used a residual methodology. What is at issue in this case is whether this Court should review the decisions of the lower courts holding that the Airlines do not have a legal right to impose a residual-type methodology upon this Airport. Never in previous Airport rate studies has there been any allocation of airside costs to the concessionaires (parking lot, restaurant, gift shop, car rental agencies, etc.) at the Airport. For more than 20 years the Airport has consistently applied its cost accounting methodology to develop the factual foundation for negotiating the landing fees and terminal rental rates reflected in executed leases. (3a, 7a, 27a, 28a)

The Airlines in their Petition continue to mix revenue sharing and residual lease concepts with the Airport's compensatory methodology that has always been a pure cost allocation system. There is no single, simple, magical lease methodology or allocation system that can be tailored to all airports. Neither the FAA nor the Courts has ever attempted to impose a type of methodology upon airports and their airline tenants.

C. Application of the Airport Methodology.

The Airport has used its methodology since 1968. (27a) Before cost allocations are made, the Airline/tenants are always given the benefit of (or "credit" for) the following factors in determining allocated costs under the Airport's methodology (27a):

- (a) Fees and rentals are based on actual, incurred cost, not upon "replacement cost" or "current market value."
- (b) All federal and state funds received by the Airport are deducted from the cost of the airport improvements before determination of charges to the airlines, leaving only locally contributed costs in the methodology.

- (c) The charges to the Airlines do not include the cost of any land or facilities for the following Airport functions and/or other non-Airline tenants: (1) United States government weather station; (2) United States customs office; (3) FAA offices; (4) auto parking lot areas; (5) fixed based operator locations and facilities; (6) car rental service facilities and parking lots; (7) restaurant and gift shop space; and (8) the Airport Motel and land on which it exists.

The landing fees and rental rates which the Airlines agreed to by signed lease agreements for the period from January 1, 1984 through December 31, 1986, the disputed March, 1988 Ordinance landing fees and rental rates effective for April 1, 1988 to December 31, 1989, the Trial Court's Opinion thereon, and Sixth Circuit Court of Appeals Opinion thereon, are as follows:

	1984-86 PREVIOUS LEASE TERMS	1988-89 AIRPORT "NEW" TERMS	TRIAL COURT OPINION	SIXTH CIRCUIT OPINION
Landing Fees	50¢ ³	70.21¢	Approved	Approved ⁴
Prime space	\$18.00/ sq. ft.	\$24.67/ sq. ft.	Approved	Approved
Non-prime space	\$10.50- \$11.75/ sq. ft.	\$12.34/ sq. ft.	Approved	Approved

³ Per 1,000 lbs. of aircraft weight, charged only for landing.

⁴ In a divided Opinion the Sixth Circuit Court of Appeals ordered a remand on the factual issue of CFR cost allocations as between the Airlines and other tenants. This is a fact question that Respondents do not present to this Court for review. Also see Section IVD hereof.

In short, this Airport did nothing more than utilize its historic, cost accounting rate-making methodology to develop new landing fees and new terminal rental rates that were increased for April 1, 1988 to December 31, 1989, when compared to the past lease period of 1984 to 1986. Thus, the relevant landing fee and terminal rental rate comparisons span a five-year period of time. Each detailed reason for each allocated cost component was reflected in the extensive Airport rate study and in all other related exhibits. The major reasons for these increases are set forth below.

The landing fee increase from 50¢ to 70.21¢ resulted from the cost of improvements to the airfield made during the 1984-1987 period, from increased, FAA mandated Crash/Fire/Rescue (CFR) expenses, and from the inflationary increase in Airport operating costs. Approximately half of this landing fee increase was caused by the CFR expenses.

The landing fees (with all CFR costs), when calculated on a *per passenger* basis from 1983 to 1988, decreased from 76.47¢ to 56.77¢.

The Airlines in prior leases accepted \$18/sq. ft. and \$10.50 to \$11.75/sq. ft. terminal rental rates for 1984 to 1986. Airport expenditures during 1984-1987 (primarily a Terminal Building Addition in the amount of \$3,174,842.00) justify the increased terminal rental rates. The Airlines did not contest this important and necessary addition to the terminal building, which increased the cost base.

Significantly, the District Court found that the totality of all types of the earlier Airport's 1986 and 1987 charges to the Airlines represented only 1.2% of the Airline revenues generated at the Airport. (37a) The totality of the challenged Ordinance user fees, if applied for all of 1988, represented only 1.5% of the 1988 Airline revenue generated. (37a) Thus, the incremental difference or impact of these rates is only 0.3% of all Airline revenues generated at this Airport. The amount and nature of these

challenged airport user fees certainly are not of exceptional national importance, do not violate any federal statute, do not constitute a burden on interstate commerce, and clearly have not caused any airline industry financial devastation.

There is no factual dispute about the incurrence of, need for, or reasonableness of the Airport's actual terminal building costs or actual landing area costs. The only dispute concerns allocation of these costs among different airport tenants. The "bottom line" objective of the Airlines is to transform their status as tenants to that of partners so that the Airlines can share in the concession revenues of this Airport without having shared in earlier risks and financial commitments. As analyzed and argued hereinafter, the Sixth Circuit correctly rejected the attempt by the Airlines to share in the Airport's concession revenue.

II. APPLICABLE LEGAL PRINCIPLES REGARDING CHOICE OF AIRPORT METHODOLOGY AND JUDICIAL RESOLUTION OF ACCOUNTING DISPUTES

As noted in Section I, this case involves the Airline challenges to this Airport's historic rate-making approach. Applicable legal principles do not support this challenge.

A. The Airport has the Legal Right to Choose its Own Rate-Making Methodology.

Each airport has the right to choose its own rate-making methodology, so long as it produces reasonable results. *Raleigh-Durham Airport Authority v Delta Airlines*, 429 F.Supp. 1069, 1078-79 (E.D. N.C. 1976). The Airlines have cited no case law, statutory or FAA authority for the proposition that this Airport's "compensatory" or "cost of service" rate-making methodology is illegal *per se*.

B. The Judiciary Wisely Refrains from Entanglement in Complex or Hybrid Accounting Issues.

As noted at trial, the FAA oversees airport operations under the extensive regulatory scheme established in the Airport and Airway Improvement Act of 1982 ("AAIA"). 49 U.S.C. § 2201 *et seq.* AAIA requires that Airlines' charges be reasonable and non-discriminatory. The Airlines never complained to the FAA with reference to these challenged Airport fees.

The FAA has never mandated a specific type of airport rate-making methodology. Nor has the FAA imposed specific accounting principles or standards upon airports to use in formulating airport user fees. The Airport user fees at issue in this case violated no FAA rules and regulations and violated no Generally Accepted Accounting Principles ("GAAP") nor any Cost Accounting Standard Board ("CASB") criteria.

This case has always involved a "battle" over differing airport rate-making methodologies. The Airport has consistently utilized its pure cost allocation system, whereas the Airlines here attempt to impose upon this Airport a no-risk revenue sharing or "residual" lease approach. At issue is the Airport's historic cost allocation system versus the Airlines' suggested hybrid system based upon both different cost allocation concepts and new concession revenue sharing credits. The Courts below properly rejected the Airlines' attempt to dictate the type of methodology to be utilized by an Airport. Nearly 50 years ago in an IRS case Justice Brandeis in a unanimous opinion of this Court observed as follows in *Brown v Helvering*, 291 U.S. 192, 204-05; 54 S.Ct. 356, 361; 78 L.Ed. 725, 733 (1934):

It is not the province of the court to weigh and determine the relevant merits of systems of accounting.

This prudent advice has been consistently followed by this Court in accounting dispute cases.

III. SUMMARY ANALYSIS OF THE ANTI-HEAD TAX ACT AND RELATED FEDERAL AIRPORT STATUTES

The Anti-Head Tax Act (AHTA), when enacted, and when amended in 1990, is part of an Airport federal statutory framework. The Airlines' AHTA concession revenue contentions are inconsistent with the legislative history of AHTA and inconsistent with the broader federal statutory framework within which these Airline/Airport disputes must be analyzed. The Airlines' specific certiorari contentions are analyzed in Sections IV, V and VI.

A. 1973 AHTA Enactment Legislative History.

As the title of this federal statute unequivocally indicates, the Anti-Head Tax Act ("AHTA") was designed to prohibit airports from imposing the type of "head taxes" (per passenger charges) earlier approved by this Court in *Evansville-Vanderburgh Airport Auth. Dist. v Delta Airlines*, 405 U.S. 707; 92 S.Ct. 1349; 31 L.Ed. 2d 620 (1972). AHTA was not enacted with the intent of altering pre-existing Airport landing fees and terminal rental rates that historically had been imposed upon the commercial airlines [49 U.S.C. § 1513(b)].

The Federal AHTA provisions were enacted in 1973 as one part of a broader statutory plan⁵ to increase the availability of federal funds for public airports to cover the costs of airport development.

The Anti-Head Tax Act, in relevant part, reads as follows:

1513(a) No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the

⁵ Titled the Airport Development Acceleration Act of 1973, P.L. 93-44.

carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.

1513(b) Nothing in this section shall prohibit a State (or political subdivision thereof . . .) . . . from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Nowhere in this short statutory provision and *nowhere* in its legislative history is there any indication that Congress ever considered or intended to regulate any aspect of airport concession income. Congress was aware of Airport concession revenues (and the surpluses above costs they generate) and recognized those revenues as legitimate and necessary for Airport expansion. (Airport Development Acceleration Act of 1973; Senate Committee Report at 119 Cong. Rec. 3348 at 3352.)⁶

The whole thrust of the enactment of AHTA was to prohibit states (and local governments) from taxing the *act of enplanement* on which the Federal Government had already imposed a uniform Federal user tax system.

B. The 1990 Passenger Facility Charge ("PFC") Amendments to AHTA Specifically Authorized Limited Head Taxes.

In 1990 the 101st Congress amended the AHTA through Passenger Facility Charge ("PFC") legislation [49 U.S.C. App. § 1513(e)] that now permits airports to impose a PFC of \$1, \$2, or \$3 upon each passenger enplaning at the airport. In establishing this current PFC

⁶ For instance, it is clear that Congress in enacting AHTA intended that Airport revenues from concessions be used in financing capital improvement programs, while obviously also recognizing that this intention dovetailed with AAIA that requires that such revenues remain on the Airport for Airport purposes.

program as an amendment to AHTA, Congress in 1990 clearly recognized the continuing massive capital needs of U.S. airports, which were estimated at \$50 billion for 5 years, or \$10 billion per year, which amount far exceeds the annual amount of federal grants authorized in that same legislation (\$1.8 billion for 1991 and \$1.9 billion for 1992). [H. Rep. No. 581, 101st Cong. 2d Sess. (1990) at 11 and 16]

The FAA must approve the levy of a PFC, the amount of the proposed fee, and the future airport projects for which PFC revenues will be used. This involves consideration by the FAA of the airport capital improvement plans and the future availability of both local and FAA funds. Under procedures in which the Airlines can comment and participate, the FAA audits PFC collections and regulates the utilization of PFC funds. This is another example of how Congress has delegated authority to FAA to oversee airport charges and capital development. The Airport, in view of its substantial capital needs, has applied to the FAA for approval to institute a PFC. [57 Fed. Reg. 24,842-43 (1992)]

Nowhere in the recent PFC legislative history is there any indication Congress intended to limit airport revenues or to require airports to consider their concession revenues (or losses) when formulating airline charges.

IV. THERE IS NO AHTA CONFLICT AMONG THE CIRCUIT COURTS THAT WARRANTS ISSUANCE OF A WRIT OF CERTIORARI. THE SIXTH CIRCUIT COURT OF APPEALS OPINION CORRECTLY RESOLVED THE RATE REASONABLENESS ISSUES

A. The Indianapolis Case is Factually Distinguishable from the Instant Case, Has Never Been Followed By Any Other Circuit, and Creates No AHTA Conflict Worthy of Granting Certiorari.

Indianapolis Airport Auth. v American Airlines, Inc., 733 F.2d 1262 (7th Cir. 1984), the only judicial authority relied

upon by the Airlines at trial for their continuing attack upon the Airport terminal rental rates and landing fees under AHTA, has never been embraced by any other court on AHTA issues. Thus, while *Indianapolis* and this case are clearly distinguishable on their facts, there is no need for the Court to grant certiorari, even if this Court finds that the *Indianapolis* case (on limited concession revenue accounting issues) conflicts with this properly decided Sixth Circuit Court of Appeals Opinion.

The Sixth Circuit distinguished *Indianapolis* on two⁷ important grounds. First, "the Indianapolis airport serves in a monopoly environment. As judicially noted by the District Court, Kent County Airport is located less than an hour and a half from two airports serviced by major airlines. This means that the passenger has some role in determining from which airport to travel."⁸ (10a)

⁷ Also, in *Indianapolis* the landing fees and terminal rental rates were significantly increased in a short time frame ["almost double those in the expired leases" (733 F.2d at 1264)]. The Indianapolis Airport Authority also "switched" from its earlier "residual" lease to the challenged "compensatory" lease. Previously at the Indianapolis Airport the airlines had been receiving "credits" for portions of the airport concession revenues due to the Indianapolis Airport's voluntary past decision to utilize residual methodology leases. No such residual lease has ever been used at this Airport, and no such credits ever existed at the Kent County International Airport. Further, the *Indianapolis* case was premised upon flawed, inapplicable, cost accounting concepts known as "by-product" and "joint product," which factual arguments were withdrawn by the Airlines' expert witness Charles T. Horngren, when contested by the Airport's expert witnesses in this case.

⁸ Petitioners' assertion that this geographical distinction does not negate the Airport's alleged locational monopoly, but only limits it (Petitioners' Brief p 14, fn 8), is unsupported by the Airlines' citation to a separate passage (p 1269) in the *Indianapolis* case, which discusses the ability of passengers to avoid parking lot fees or other specific concession charges at a

Second, the Sixth Circuit found that the Airport fees charged to non-airline concessions did not directly affect the airlines or their passengers, citing with favor the following finding in *City and County of Denver v Continental Airlines*, 712 F.Supp. 834, 838-39 (D. Colo. 1989) ("*Denver*"):

Persons affected by the rates, rentals and charges for the restaurants, gift shops, parking lots and rental cars, include persons who are not air passengers . . . no person traveling to, from or through [the airport] . . . is required to park in the parking lot, rent a car, eat at a restaurant or buy a magazine. Those are all individual decisions driven by individual perceptions of need and economic values. That is not the case with respect to the use of the airport's runways, taxiways, and airline portions of the terminal area. [(10a) citing *Denver*, 712 F. Supp. at 838-9.]

The *Denver* Court had further noted that "the Supreme Court found it reasonable for state and local governments to distinguish passengers as a class from other airport users." (*Denver*, 712 F. Supp. at 838, citing *Evansville*, 405 U.S. at 716-18; 92 S.Ct. at 1355-56; 31 L.Ed. 2d at 629-30). In contrast, the *Indianapolis* Court made a different factual determination that "the people who use the concessions at the Indianapolis airport are, with rare exceptions, airline passengers." (*Indianapolis* at 1267)

A critical factual, accounting theory difference between this case and the *Indianapolis* case is that *Indianapolis* was premised upon a flawed factual assumption that the Airlines cause the "flow of passengers", whereas in this case uncontroverted testimony established that the population and business base of the local community (not

monopoly location. In fact, the District Court specifically found that "the Airport in Grand Rapids is not in a monopoly situation." (34a)

the Airlines) created the primary need for the public airport. (See p 2 hereof)

As the nature of trial testimony and the number of detailed exhibits indicate, this has always been a very fact-intensive rate case regarding the alleged unreasonableness of the Airport landing fees and terminal rental rates. As to both types of fees there were extensive, detailed cost allocation calculations that impact all Airport tenants. This is a cost allocation case, whether reviewed under AHTA or under the Commerce Clause. The Sixth Circuit Court of Appeals properly approved the reasonableness of the cost allocation decisions which the Petitioners seek this Court to review. These factual distinctions do not form a basis for granting certiorari.

B. There is No Active Legal Issue Conflict Among the Circuits Worthy of Supreme Court Resolution.

The 7th Circuit *Indianapolis* decision has been met with a notable lack of enthusiasm by all courts which have specifically addressed AHTA issues since this 1984 opinion. In addition to the lower courts in this case, the *Denver* district court "respectfully declined" (p 839) to follow its AHTA reasoning, specifically also rejecting the public utility analogy urged by the *Indianapolis* case. Similarly, the First Circuit did not adopt the Majority Opinion *Indianapolis* approach, when rejecting the applicability of AHTA to fees assessed on aeronautical users such as airlines. *New England Legal Foundation v Mass. Port Auth.*, 883 F.2d 167 (1st Cir. 1989). In these AHTA cases, the circuits are properly deciding on their own that *Indianapolis* is an AHTA concession revenue aberration which requires scant consideration.

Accordingly, this Court's immediate intervention to resolve this alleged conflict is not necessary.

C. The Sixth Circuit Court of Appeals Applied an Appropriate Reasonableness Test Under AHTA. Review of that Decision is not Warranted.

The Sixth Circuit Court of Appeals correctly applied the following AHTA test of reasonableness:

A fee assessed is reasonable as long as it is based on some fair approximation of the cost of providing the facilities and services, is relevant to the operation of the airport, and is not arbitrary and capricious, but is based on a uniform, fair and practical standard. See *Evansville-Vanderburgh Airport Auth. Dist. v Delta Airlines*, 405 U.S. 707, 712-14 (1972), quoting *Hendrick v Maryland*, 235 U.S. 610, 624 (1915); *Mass. Port Auth.*, 580 F.2d at 1038. An assessment of costs for the common space need not depend on a district court's estimate of the benefits each renter derives from its customers' use of the common area. Although such a method would be a possible method for assessing costs, there is nothing in the Act that dictates that such a method must be used. (p 11a)

As discussed herein, the 6th Circuit decision is entirely consistent with applicable Supreme Court precedent on rate reasonableness standards, and reached a proper result.

D. Contrary to Airline Petition Assertions, Chief Judge Merritt's Dissent in the Denial of Rehearing on the CFR Cost Allocation Question Is No Basis for Granting a Petition for Certiorari on Other Issues.

The Airlines have distorted the limited nature of Chief Judge Merritt's Dissent from the denial of rehearing with respect to the single issue of the 100% Crash, Fire, and Rescue (CFR) cost allocation. That Dissent, rendered in the context of the Airlines' Motion for an en banc Rehearing, was specifically limited to "the question of

allocating the cost of Airport firefighting and rescue services"⁹ (62a). This issue is not before the Court. Accordingly, its disposition affords no basis for the Airlines to petition for certiorari. The Airlines' attempt to fashion a conflict from Chief Judge Merritt's Dissent – which in *all other* respects supported the decision of the original panel – is baseless.

E. The General Aviation Cost Allocation Collection Issue was Properly Resolved and is not a Certiorari Issue.

AHTA established no guidelines for the interpretation of "reasonableness" under § 1513(b). However, AAIA (which must be considered in applying AHTA) expressly places the commercial airlines in a different classification of user than General Aviation entities and/or concessionaires. 49 USC App § 2210(a)(1)(A) and (B). The totality of the Airport's rate-making methodology complies with AAIA, with the applicable Airport Grant Assurances, and with all FAA rules and regulations. Different Airport treatment of different classifications of tenants is expressly permitted by AAIA, confirming historic Airport practices. As the Sixth Circuit Court of Appeals properly observed, the uncollected General Aviation landing fee cost allocations are absorbed by the Airport, and never charged to or paid by the commercial airlines. The

⁹ The *Indianapolis* case specifically held that "the bulk of the firefighting costs are properly allocable to the Airlines" (*Indianapolis*, at p 1271). Earlier trial counsel for the Airlines acknowledged in court that the Airlines should be responsible for the "lion's share" of such CFR expenses, noting that the Airlines paid 80% of such expenses at the Indianapolis Airport. (pp 78 to 83 of the January 18, 1990 District Court hearing transcript). This CFR cost allocation variance (between "bulk" or a "lion's share" and 100%) is a limited, fact question not presented to this Court by any party.

Airlines never presented this alleged General Aviation "discrimination" question to the FAA under AAIA.

V. THERE IS NO INTERSTATE COMMERCE CLAUSE ISSUE THAT WARRANTS ISSUANCE OF A WRIT OF CERTIORARI. THE SIXTH CIRCUIT COURT OF APPEALS OPINION CORRECTLY RESOLVED ALL INTERSTATE COMMERCE CLAUSE ISSUES.

A. The Factual Record in This Case Does Not Support a Commerce Clause Claim.

As previously noted, the undisputed incremental (0.3%) difference discussed at page 8 hereof cannot constitute a burden upon Interstate Commerce, nor cause the significant financial industry difficulties now complained of by the Airlines. No Airport/Airline governmental statistics or Airport/Airline industry studies were offered at trial by the Airlines.

With the advent of airline industry deregulation in the late 1970s, the commercial airlines can now increase or reduce air fares, change plane sizes and weights, cease "over-nighting" planes, limit routes, sell gates, reduce rental space, or leave this Airport for any reason without penalty, whether related to Airport charges or not. No major (non-commuter) commercial airline has ever chosen to leave this West Michigan Airport.

In this case the judiciary has not "abdicated" its Commerce Clause responsibility as argued at page 23 of the Airlines' Petition. The Airlines' factual proofs¹⁰ never

¹⁰ Directed to each Airline early in the discovery period were numerous specific Interrogatories designed to isolate the Airlines' specific Interstate Commerce Clause contentions regarding the allegedly illegal and/or unreasonable Airport fees and charges. The identical Answers of all Plaintiffs revealed absolutely no unique facts that would allow this Court to distinguish between a "reasonableness" inquiry under an Interstate

triggered even a theoretical consideration of the Commerce Clause. In short, the Interstate Commerce Clause was not "automatically rendered inapplicable to an area of commerce" as broadly argued in the second "Question Presented" by the Airlines.

In any event, as noted below in Sections B and C, there is no legal basis for the Airlines' Interstate Commerce Clause contentions.

B. There is no Conflict Among the Circuits, all of Which Circuits in Airport Cases Have Held that the Interstate Commerce Clause is not Legally Applicable to Airport Landing Fees and Terminal Rental Rates.

It is clear that the District Court and the unanimous opinion of the Sixth Circuit Court of Appeals properly invoked the "dormant" commerce clause approach advanced earlier by this Court in *Merrion v Jicarilla Apache Tribe*, 455 U.S. 130; 102 S.Ct. 894; 71 L.Ed. 2d 21 (1982).

In *Merrion* this Court explained and defined the limits of judicial review of alleged Commerce Clause violations, indicating that courts should

only engage in this review when Congress has not acted or purported to act . . . Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action . . . Courts are final arbiters under the Commerce Clause only when Congress has

Commerce Clause analysis, as opposed to a "reasonableness" inquiry under AHTA. Also see Section IV D.

not acted. *Merrion*, 455 U.S. at 154-5; 102 S.Ct. at 910-11; 71 L.Ed. 2d at 40 (citations omitted).

It is unclear whether the Airlines are now suggesting that there is a conflict among the circuits regarding a "dormant" commerce clause approach in *Airport rate cases*.¹¹ If the Airlines are so arguing, however, this premise is erroneous. No such conflict exists among the circuits in airport rate cases involving interpretation of federal airport statutes and/or FAA regulations and Grant Assurances. [The Sixth Circuit Court of Appeals Opinion (Appendix p 16a-17a); *New England Legal Foundation v Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989) at p 174; and *Indianapolis*, 733 F.2d at p 1266.]

In fact, the *Indianapolis* case (p 1266), citing *Merrion*, clearly stated that Interstate Commerce Clause review was not appropriate to airport rates and charges, given the federal statutory and regulatory scheme which governs them.

It is curious to note that on page 15 of their Petition the Airlines cite *Alamo Rent-A-Car, Inc. v City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992) and *Alamo Rent-A-Car, Inc. v Sarasota-Manatee Airport Authority*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, ___ U.S. ___; 111 S.Ct. 1073; 112 L.Ed. 2d 1179 (1991) for the apparent, inappropriate proposition that an Interstate Commerce Clause analysis is mandatory. Significantly, these cases involve non-tenants that are not specifically subject to AHTA [§ 1513(b)], under which the Airlines proceeded in this case. In short, the potential for a "dormant" Commerce Clause approach never even existed in these two *Alamo Rent-A-Car* cases. Most significant, however, in the 11th Circuit *Alamo Rent-*

¹¹ The inapplicable, non-airport commerce clause cases cited by the Airlines at pages 16 to 19 of their Petition wander into newly raised areas of federal preemption or into areas of foreign or interstate commerce where there has been no preexisting federal statute or regulatory agency. Those cases decided outside an Airport context are wholly inapplicable.

A-Car v Sarasota-Manatee case is the following critical citation and discussion of the *Evansville* case:

As discussed above, the fact that different users are charged different fees or that certain users are not charged at all does not invalidate the scheme. See *Evansville-Vanderburgh*, 405 U.S. at 715-19, 92 S.Ct. at 1355-56 (majority of airport users exempted from fee in whole or in part). (906 F.2d at p 521)

The Airlines' apparent efforts to manufacture a Commerce Clause "discrimination" case based upon the *Evansville* case is clearly unwarranted.

*Merrion*¹² has been properly applied in all similar Airport/Airline rate cases since adoption of AHTA and AAIA. All Circuits are in accord in rejecting the need for a Commerce Clause analysis as to Airport matters covered by AAIA and/or AHTA.

¹² In *Sporhase v Nebraska*, 458 U.S. 941; 102 S.Ct. 3456; 73 L.Ed. 2d 1254 (1982), cited by the Airlines at pages 12 and 18 to limit the scope of *Merrion*, there was no applicable federal statutory scheme or federal regulatory agency in existence. In *Sporhase*, primary resort (on an appropriate factual record) to the Interstate Commerce Clause was necessary. In particular, *Sporhase* involved a contention that Congressional failure to adopt federal statutes and failure to oppose state water agreements resulted in an implied Congressional consent to allow state ground water regulation that would otherwise have been impermissible under the Interstate Commerce Clause. Thus, the *Sporhase* majority opinion referred to "the affirmative power of Congress to implement its own policies concerning such regulation" (p 1264) and to the "unexercised federal regulatory power" (p 1264), while the dissenting Opinion likewise observed (p 1269) that there had been an "absence of any action by Congress." As to appropriate airport regulation Congress has acted extensively. The Airlines' assertion that the *Sporhase* (p 1268) citation to *Merrion* was a limitation on the scope or application of *Merrion* is erroneous.

C. The Sixth Circuit Decision is not in Conflict with This Court's Decision in *Evansville*.

In judging whether the amount of the collected head taxes (per-passenger charges assessed by airports) approximated the actual costs incurred by the Indiana and New Hampshire airports for the governmental benefits provided, this Court in *Evansville* properly observed that, as to such financial analysis, a court "must be content with 'rough approximation rather than precision,' " ruling concisely as follows:

At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users. *Evansville*, 405 U.S. at 716-17; 92 S.Ct. at 1355; 31 L.Ed. 2d at 629.

In short, when analyzing the potential interstate commerce burden or alleged discrimination occasioned by airport charges, there is no single formula or universally accepted accounting approach or analysis. Appropriate study is focused upon the amount of the charge, not the formula or accounting methodology that produces the charge.

The Court in *Evansville* found that the head taxes in question "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." (405 U.S. at 717; 92 S.Ct. at 1355; 31 L.Ed. 2d at 629). With respect to the fees for which Petitioners seek review in the present case, the District Court found that "the plaintiffs were charged the break-even costs for the areas they use." (37a) Thus, the fees assessed on the Airlines are clearly not "excessive in comparison with the governmental benefit conferred."

While arguing the *Evansville* case the Airlines continue to confuse the objective approach of historic cost allocations with the subjective evaluation of benefits¹³ received by Airport tenants who rent and use numerous Airport facilities. Nowhere does *Evansville* require that costs of airside facilities (which airlines use but concessionaires do not) must be allocated to concessionaires because they "benefit" from the operation of the Airport, so as to reduce the Airlines' cost of using such facilities.

In *Evansville*, the Court recognized that the fee, which was imposed only on airline passengers, exempted "in whole or part a majority of the actual number of persons who use facilities of the airports involved . . . [including] certain classes of passengers, such as . . . passengers on noncommercial flights, nonscheduled commercial flights, and commercial flights on light aircraft. Also exempt are nonpassenger users, such as persons delivering or receiving air-freight shipments, meeting or seeing off passengers, dining at airport restaurants, and working for employers located on airport grounds." (405 U.S. at 717; 92 S.Ct. at 1355-56; 31 L.Ed. 2d at 629-630) This Court in *Evansville* further noted that "Certainly passengers as a class may be distinguished from other airport users, if only because the boarding of flights requires the use of runways and navigational facilities not occasioned by nonflight activities. Furthermore, business users, like shops, restaurants, and private parking concessions, do contribute to airport upkeep through rent, a cost that is passed on in part at least to their patrons." (400 U.S. at 717; 92 S.Ct. at 1355-56; 31 L.Ed. 2d at 630) Thus, the Court recognized distinctions between those who use airside facilities and those who do not, and explicitly

¹³ Because their fees are based on historic costs, not on higher market rates or on higher replacement costs, the Airlines also "benefit" from the Airport facilities they use to a much greater extent than they pay for them.

distinguished passengers as a class from those who use concessions.

As to the requirement that fees are not excessive in comparison with the governmental benefit conferred, this Court found that the airlines in *Evansville* had "not shown these fees to be excessive in relation to costs incurred by the taxing authorities" (405 U.S. at 719; 92 S.Ct. at 1357; 31 L.Ed. 2d at 631), noting further that there was no evidence that the fees would do more than meet the past as well as current deficits of the airport which had been subsidized by the locality. In the instant case the fees imposed on the Airlines only "break even" with the airside and terminal costs associated with the Airlines' actual use of those facilities. (3a; 28a; 37a)

The Airlines note that the full allocated costs of General Aviation are not collected from that segment of the industry, apparently equating General Aviation with intrastate aviation without offering any proof for that connection. Nonetheless, in *Evansville*, the Court approved a fee which was imposed *only* on commercial aviation passengers and not on non-commercial passengers (such as General Aviation users). Even if Petitioners' unsupported assertion that General Aviation planes are engaged in intrastate flights to a greater degree than commercial airlines is true, this Court in *Evansville* upheld fees imposed on commercial but not General Aviation passengers. And as the Sixth Circuit noted in its Opinion, any shortfall in the collection of General Aviation fees is made up from the Airport's other income, not from any charges to the Airlines. (18a)

Although Respondents submit that the Airlines' Interstate Commerce Clause argument was properly rejected by the Courts below when applying this Court's decision in *Merrion*, it is clear in any event that all *Evansville* Interstate Commerce Clause standards were met by the Airport charges challenged by the Airlines.

D. An AHTA "Reasonableness" Inquiry is Equivalent to a Commerce Clause Analysis.

A final reason that the Airlines' Commerce Clause arguments do not raise an issue worthy of consideration by this Court is that the "reasonableness" standard as applied by the Sixth Circuit with respect to AHTA is functionally equivalent to any Commerce Clause "reasonableness" test. Significantly, the Airlines have offered no factual or legal authority for a unique Commerce Clause concept of reasonableness. The Airlines were able to raise all of their reasonableness arguments in the context of an alleged AHTA violation. Both the District Court and the Court of Appeals found these Airport fees to be reasonable.

VI. THERE IS NO ERRONEOUSLY DECIDED ISSUE OF NATIONAL IMPORTANCE

In accordance with applicable law establishing an Airport's right to choose its own rate-making methodology and in accordance with the appropriate application of "reasonableness" standards, the Sixth Circuit properly resolved all factual cost allocation issues which the Airlines seek to have this Court review.

The Airlines in their Petition now grope for inapplicable Airport/Airline industry statistics¹⁴ that are outside the factual record of this case.

The Airlines now arcanelly appear to suggest that somehow this Airport's 0.3% incremental impact on their ticket revenues at this Airport (for 1988 and 1989) has caused the recent (1992) wild swings in airline industry profits and losses. The ridiculousness of such an assertion is illustrated by the following facts *in this record*:

¹⁴ For instance, the Airport "operating profit" statistics cited by the Airlines at page 20 do not take into account the capital needs and expenses of the airport industry. Nor do these Airport "operating profit" statistics uniformly and reliably include depreciation expenses or interest costs.

- (a) For more than 20 years this Airport's methodology has remained the same, while nationwide airline industry profits have "yo-yoed" during periods of time both before and after airline deregulation. The Airport's compensatory type methodology has been used by many other airports for many years. Thus, compensatory methodology leases are not the cause of any current airline industry financial difficulties.
- (b) The average per-passenger ticket price (or revenue) for the Airlines at this Airport has increased from \$135.72 in 1986 to \$151.41 at the end of the first quarter of 1989. This increase in ticket prices far exceeds Airport charge increases on an equivalent per-passenger basis.
- (c) Despite the statements at page 21 of the Airlines' Petition, net income at this Airport has not "continued to soar", as confirmed by the Airport's public financial statements available to the Airlines.
- (d) Business decisions are never made in a vacuum. It must be noted that during the 20 years (both before and after Airline deregulation) that the Airport has been utilizing this rate-making methodology no major (*i.e.*, non-commuter) commercial airline has left this Airport. On the contrary, Delta Airlines commenced service at this Airport during this litigation.
- (e) The Airlines' assertion at page 22 that fees at airports "have steadily increased at rates far above inflation" is inaccurate as applied to this Airport. For the period of time from 1983 through 1988, the increase in such per-passenger costs was only a total of 15.3%

for such six years, whereas the CPI inflationary increase from 1983 through 1988 was 18.8%.

While the totality of national Airport charges to airlines have remained at a constant small percentage (4% or less) of total airline expenses, other areas of airline expenses (fuel, employee benefits, bankruptcy protection of certain competing carriers, mileage or bonus programs, airfare "wars", initiation or cessation of routes, etc.) have been the cause of the Airlines' current financial difficulties. Airline 1992 press releases and public financial statements confirm this airline industry assessment.

In short, the Airlines' current financial wounds are self-inflicted, are certainly not caused by this Airport's historic rate-making approach, and are not independent grounds to grant certiorari in this case.

VII. CONCLUSION

The Airlines' Petition for Issuance of a Writ of Certiorari should be denied.

Respectfully Submitted,

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No. 92-97

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC.,
USAIR, INC., AMERICAN AIRLINES, INC., and UNITED
AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In its Opposition, the Airport: (1) confuses and mischaracterizes the important questions raised by this case; (2) incorrectly suggests that the case is "fact intensive"; (3) erroneously contends that the case presents no conflict in the Circuits and no departure from this Court's precedents; and (4) ignores the undisputed, widespread importance of the questions presented. None of these efforts to avoid review by this Court is sound.

1. THE ACTUAL QUESTIONS PRESENTED

This case raises two straightforward questions: whether the Airport's fee methodology is "reasonable" under the AHTA; and whether the courts are precluded from reviewing the methodology under the Commerce Clause simply because Congress took some action to regulate airport fees. These were the questions presented and decided below and that the Airlines now ask this Court to review. The Airport, however, attempts to transform the case into something it is not, by claiming (a) that the Airlines wish to be made "partners" with the Airport through a "cross-crediting" of concession revenues, and (b) that the Court would have to engage in complex issues of cost-accounting in order to resolve the dispute. See Brief of All Respondents in Opposition to Petition for Writ of Certiorari ("Opp.") at 1, 6, 9, 10. Both these claims are spurious.

The Airlines have never argued that the AHTA regulates concession revenues, that the Airlines are entitled to "share" in those revenues, or that the courts must "impose" a single accounting system on this or any other airport. The Airlines contend only that the fees imposed on *them* are unreasonable under the AHTA, and that concession operations must be *considered* when deciding that issue. Specifically, the Airlines have contended that Airline fees which assign all costs of airside activities to the Airlines and none to concessions are necessarily unreasonable (as Judge Flaum held in *Indianapolis*); that total fees on Airlines and their passengers (including concession fees) that are out of all proportion to Air-

port costs are necessarily unreasonable (as Judge Posner held in *Indianapolis*); and that, even if concession operations must be totally ignored under the AHTA—which Congress clearly did not intend¹—those concessions are necessarily part of interstate commerce and must therefore be included in testing the reasonableness of total Airport charges under the Commerce Clause. Contrary to the Airport's assertion (Opp. 1 n.1), the Airlines have been completely consistent on all these issues.

Nor would resolution of these issues entangle the Court in complex accounting or rate-setting matters, any more than it did the lower courts. See Opp. 10. The Court is simply being asked to decide whether the Airport's fee methodology is reasonable under the clear standards already set forth in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). Thus, as Judge Posner noted in *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984), there is no "single valid method" of calculating fees, and no cause for this Court to "tell [the Airport] what fees it must charge." *Id.* at 1270. Rather, the Court is being asked only to "invalidate an unreasonable rate," not to "fix the reasonable rate." *Id.* This is plainly an appropriate judicial function; so too is deciding whether the Airport's fee methodology violates the Commerce Clause, an issue the Sixth Circuit refused to decide. *These* are the questions presented by this case, and nothing in the Airport's Opposition should be allowed to obscure them.

¹ That Congress intended concession operations to be taken into account is demonstrated by its enactment of 49 U.S.C. § 2210, which the Airport agrees "must be considered in applying AHTA." Opp. 18 (emphasis supplied). That statute requires that airports "be available for public use on fair and reasonable terms and without unjust discrimination" and charge total fees "which will make the airport as self-sustaining as possible." 49 U.S.C. § 2210(a)(1), (9). The legislative history to the AHTA furthermore makes clear that Congress intended thereby to preclude Airports from earning "financial windfalls" on top of the substantial subsidies already being provided by the federal government. See S. Rep. No. 93-12, reprinted in 1973 USCCAN 1434, 1446.

2. THE SIMPLE, UNDISPUTED FACTS UNDERLYING THE QUESTIONS

Contrary to the Airport's assertions, this is not a "fact-intensive rate case" that is "heavily dependent on the fact findings of the District Court." Opp. 6, 2. The few material facts are simple and undisputed: (1) the Airport assesses fees earning surpluses far in excess of its needs to remain self-sustaining (see App. 9a, 30a); (2) the Airport allocates to the concessions none of the costs of "airside" operations, but charges nearly all those costs to the Airlines (see App. 27a); and (3) the Airport charges the Airlines 100% of their allocated costs, while charging local aviation only 20% of their allocated costs. (See App. 12a). The question is whether on these undisputed facts the Airport's methodology is "reasonable"—as a matter of law—under both the AHTA and the Commerce Clause.

The Airport, however, has attempted to manufacture other dispositive "factual" issues. For example, the Airport contends that this case turns on the "factual" finding that the Airlines are being charged only the Airport's "break-even" costs. Opp. 3 (quoting App. 37a). This contention seriously misconstrues the record. It is *undisputed* that the Airport's fee methodology generates huge surpluses (a fact which "troubled" the District Court (App. 39a)) at the expense of the Airlines and their passengers.² The District Court's statement that the Airlines were being charged only their "break-even" costs is its ultimate *legal* conclusion, not a factual finding; for the statement rests on the court's legal determinations that the large surpluses derived from fees imposed on the concessions and their customers, and the failure to assess the concessions any of the "airside" costs from which they benefit, are irrelevant under both the AHTA and

² As the District Court expressly found, these surpluses are accumulating at a rate in excess of \$2,000,000 per year; they had risen to \$9,000,000 by the end of 1989; and at that time the Airport's outstanding debt was less than \$2,000,000, most of which will be retired by 1994. See App. 30a.

the Commerce Clause. It is those *legal* determinations that are presented here for review.³

3. THE CONFLICT OVER THE QUESTIONS, AND THE DEPARTURE FROM THIS COURT'S PRECEDENTS

The Airport attempts to distinguish this case from *Indianapolis* on two grounds, neither of which is valid. First, the Airport asserts that, unlike at the Indianapolis airport, the availability of other airports within an hour and a half from Grand Rapids allows passengers "some role in determining from which airport to travel." Opp. 14 (quoting lead opinion at App. 10a). However, this purported availability is as irrelevant here as it was in *Indianapolis*. Under the AHTA, fees must be reasonable irrespective of an airport's monopoly power; and while the presence or absence of passenger alternatives may affect an airport's *ability* to impose unreasonable fees on them, the fees must in any case be reasonable and the test of that reasonableness remains the same. Moreover, the fact that *passengers* may have other options has nothing to do with the unreasonableness of fees on the *Airlines*. Furthermore, in *Indianapolis* neither Judge Posner nor Judge Flaum held that a court must make a threshold finding of monopoly power before it can

³ The Airport also claims there is no support for—but does not dispute—the unsurprising proposition that local aviation is primarily engaged in intrastate travel. See Opp. 25. However, as Judge Kennedy found (in dissent), the Airport discriminates "against the Airlines in favor of locally owned aircraft." App. 12a. Accordingly, she embraced the finding of the *Indianapolis* court that "since flights by private planes are more likely to be intrastate than airline flights," the discrimination "shift[s] some of the costs imposed by local users of the airport to its interstate users" App. 13a (quoting *Indianapolis*, 733 F.2d at 1271). Moreover, even if general aviation were not primarily intrastate (which it plainly is) and even if the Airlines were not primarily interstate (which they plainly are), it would still be undeniable that the Airlines are being discriminated against in favor of general aviation. And, as both Judge Kennedy found here and Judges Posner, Coffey, and Flaum found in *Indianapolis*, such discrimination renders the fees unreasonable as a matter of law.

scrutinize an airport's fees under the AHTA. Rather, those Judges simply applied the same standards the Airlines believe should be applied here and, upon doing so, found the Airport's fees unreasonable as a matter of law.

Second, the Airport incorrectly asserts that the *Indianapolis* court found that "the people who use the concessions at the Indianapolis airport are, with rare exceptions airline passengers," while the same is not true in this case. Opp. 15-16 (quoting *Indianapolis*, 733 F.2d at 1267). This is simply incorrect. As the Airport expressly *conceded* in the court below, "most of the passengers at the Airport are Western Michigan origin or destination ('O and D') travelers, *who constitute the primary consumers generating the non-aeronautical (concession) revenue . . .*"⁴ Thus, as in *Indianapolis*, it is clear that the Airlines and their passengers are effectively charged total fees that are out of all proportion to the Airport's costs. It is also clear that even if Grand Rapids were not an airport where airline passengers in practice pay the concession fees, the fee methodology in this case would still be unlawful under *Indianapolis*; for it would still be true that the concessions at this Airport receive a substantial benefit from the airside activities that create their customer flow, but are allocated none of the costs of those activities; and it would also still be true that the Airlines are discriminated against in favor of local aviation. In short, there is no meaningful distinction between this case and *Indianapolis*; the inescapable fact is that the Sixth and Seventh Circuits are in irreconcilable conflict.

In the face of this, the Airport is reduced to arguing that *Indianapolis* is an "aberration which requires scant attention." Opp. 16. It is, of course, debatable which of the two conflicting Circuit Court decisions is "mainstream" and which the "aberration." In our view the Seventh Circuit—which followed this Court's definition

⁴ Appellee Airport's Brief at 5, *Northwest Airlines, Inc. v. County of Kent, Michigan*, No. 90-2117 (6th Cir. 1991) (citing trial testimony) (emphasis supplied).

of reasonable fees in *Evansville*—is plainly the correct one. But for the purposes of certiorari, that is not the point. The point is that, unless the Court resolves the conflict, the dozens of airports and hundreds of thousands of passengers in the Sixth and Seventh Circuits will now be subject to a different federal standard under a statute where uniformity is important. Moreover, the same question that has divided the Sixth and Seventh Circuits will be faced by every airport in the country and, unless this Court disapproves the Sixth Circuit's approach, a majority of airports across the country will inevitably elect a methodology, as did Grand Rapids, that puts no limit on the vast surpluses they can reap from the traveling public. In these circumstances, the Airport is completely wrong to suggest that the Circuit conflict deserves "scant attention."

The Airport is also wrong to deny that the Sixth Circuit's decision conflicts with *Evansville*. Significantly, although the Airport concedes that the *Evansville* standards control the reasonableness question under both the AHTA and the Commerce Clause (Opp. 17, 26), it continues to ignore the three *Evansville* requirements. Thus, first, regarding the requirement that its fees be "based on some fair approximation of use" (405 U.S. at 716), the Airport argues that it is not required to make *any* approximation of the benefit concessions receive from the airside activities, but can charge the whole of those activities to the Airlines. This is so, the Airport argues, because in *Evansville* the Court purportedly "distinguished passengers as a class from those who use concessions." Opp. 25. Regardless whether this is an accurate characterization of *Evansville*, here the Airport has expressly *conceded* that the concession customers and the Airlines' passengers are in fact one and the same. See *supra* at 5 & n.4. Accordingly, because the Airport allocates *no* airside costs to the concessions, the fees imposed on the Airlines plainly do not represent a "fair approximation of use" and are therefore unreasonable. See *Indianapolis*, 733 F.2d at 1276 (Flaum, J., concurring).

Second, regarding the *Evansville* requirement that its fees not be "excessive in comparison with the governmental benefit conferred" (405 U.S. at 716-17), the Airport's sole response is that the District Court "found" that the Airlines were charged only "break-even" costs. Opp. 23, 25. As noted above, this is a *legal* conclusion, not a factual finding; furthermore, it ignores the huge surpluses earned by the Airport under its fee methodology. See *supra* at 3 & n.2. In light of these surpluses—which are plainly derived from the Airlines and their passengers—it is simply undeniable that the Airport's fees "do more than meet . . . past, as well as current, deficits." 405 U.S. at 720. See also *Indianapolis*, 733 F.2d at 1268.

Third, there is no justification for the Airport's deliberate and blatant discrimination against interstate airlines in favor of locally-based general aviation. Contrary to the Airport's assertions (Opp. 25), *Evansville* did not approve such discrimination; on the contrary, there this Court expressly noted that "both interstate and intrastate flights [were] subject to the same charges." 405 U.S. at 717. Here, however, as was held in *Indianapolis* and found by Judge Kennedy in her dissent in this case, the Airport's fee methodology intentionally charges the Airlines and local aviatiions vastly different rates, which "is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act." App. 13a (Kennedy, J., dissenting) (quoting *Indianapolis*, 733 F.2d at 1271).

Finally, the Sixth Circuit's holding that the Commerce Clause is inapplicable to this case cannot be reconciled with either the decisions of this Court or those of other lower courts. On this issue, this Court has repeatedly held that state regulations must meet Commerce Clause scrutiny unless Congress has "expressly stated" otherwise⁵ with an "unmistakably clear" intent.⁶ The

⁵ *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982) (citations omitted).

⁶ *South Central Timber Development, Inc. v. Wunnicker*, 467 U.S. 82, 91 (1984).

Airport's only answer is that this principle has never been specifically held applicable to "*Airport rate cases*." Opp. 21 (emphasis in original). This is surely not a serious contention.⁷ There cannot be one Constitution for airports and another for everyone else.⁸

4. THE WIDESPREAD IMPORTANCE OF THE QUESTIONS

Regarding the nationwide importance of a uniform application of the AHTA and the Commerce Clause,⁹ the Airport makes two points. First, it says we have "distorted" Chief Judge Merritt's views on this issue. Opp. 17. Specifically, the Airport points out that the Chief Judge dissented from *en banc* review only on the issue

⁷ Indeed, the lone case relied on by the Airport, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), had absolutely nothing to do with airports.

⁸ Nor is there any merit to the Airport's argument that Commerce Clause review is unnecessary because the *Evansville* test applies under the AHTA as well. See Opp. 26. Contrary to the Airport's assertions, the Airlines agree that the tests are the same. Accordingly, if the Sixth Circuit, as did the Seventh Circuit in *Indianapolis*, had correctly applied the AHTA to the *totality* of the Airport's fee methodology—including taking into account the operations of the concessions—a Commerce Clause analysis would have been unnecessary. However, precisely because the court refused to consider the effect of concession fees under the AHTA, it was obligated to consider their effect under the Commerce Clause, as the Constitution undeniably covers such charges. See, e.g., *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991).

⁹ Given the Airport's view that the Commerce Clause applies differently to airport rates than to other forms of state regulations, it has no answer to the Airlines' contention that the Sixth Circuit's view of the Commerce Clause threatens judicial abdication for numerous forms of state regulations. For under the Sixth Circuit's approach, so long as the Congress takes *any* action to regulate an area, that precludes application of the Commerce Clause to that area. As we showed in our petition (pp. 18-19), that is not the law in this Court, and its adoption by the Sixth Circuit threatens subversion of both the Constitution and congressional intent in a host of areas. That is grounds for certiorari in itself.

whether 100% of crash, fire, and rescue costs should be charged to the Airlines, even though those costs obviously benefit other Airport users.¹⁰ This was the one issue the Airlines prevailed on before the Sixth Circuit panel (on a 2-1 vote), and it appears that on the merits Chief Judge Merritt would have voted against the Airlines on that issue as well. But that is not the reason his dissent is important. It is important because the *rationale* of his dissent is the same one supporting this petition, i.e., the Sixth and Seventh Circuit are in conflict over the correct interpretation of the AHTA, that conflict concerns a matter where national uniformity is important, and the conflict will inevitably affect airports throughout the country. App. 62a-63a.

In our petition we provided specific factual information illustrating the correctness of Chief Judge Merritt's observations. Specifically, we showed the vast number of airports and passengers affected by the kind of fees at issue, the huge dollar consequences of those fees to airports, passengers, and airlines, the impact of those fees on air travel, and the threat that excessive fees pose to the viability of a number of air carriers. Pet. 19-23. The Airport's only answer is to assert that the fees at Grand Rapids constitute only a small portion of the Airlines' total revenues, and that those fees could not *alone* spell the difference between a given carrier surviving or failing. Opp. 26-28. This totally misses the point of the nationwide data presented in our petition.

Of course we do not contend that the disputed fees at Grand Rapids are enough standing alone to damage the airline industry or hamper travel nationwide; nor do we contend that such fees are the sole cause of the industry's current troubles. Rather, our contention is that if the Grand Rapids experience were to spread nationwide—and it has already been authorized for all airports throughout the Sixth Circuit—it would be of considerable harm to air travel in this country.

¹⁰ We expressly noted in our petition that Chief Judge Merritt favored *en banc* only on this issue. Pet. 13 n.7.

Our further contention is that for airlines whose continued existence is precarious—and whose profit margins are only a few percentage points at best—persistent, unreasonable fees at numerous airports will indeed be of great consequence, if not spell the difference between surviving and failing.¹¹ And our final contention is that Congress cannot possibly have intended the standard for “reasonable” fees under the AHTA to mean one thing in one part of the country, and something else in another.

The fact is that Congress intended the country’s airports to receive most of their support through federal subsidies (financed by federal taxes on airline tickets), to make up the rest through user fees sufficient to make them self-sustaining, and in no event to reap “financial windfalls” at the expense of the Airlines and the traveling public. Yet, that is what was approved in this case—in the face of this Court’s precedents and the contrary ruling in the Seventh Circuit. The matter warrants this Court’s review.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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¹¹ As we showed in our petition, airport fees constitute over 4.5% of the Airlines’ operating costs, while their profit margins are 2-3% at best. Pet. at 21-22.

No. 92-97

Supreme Court, U.S.
FILED

MAY 18 1993

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC., ET AL., PETITIONERS

v.

COUNTY OF KENT, MICHIGAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS-PRESENTED

1. Whether airport user fees charged to commercial airlines are reasonable under federal law, irrespective of the fees charged other tenants, when such fees fairly approximate the cost of providing facilities and services to the airlines.

2. Whether the Commerce Clause provides a basis for judicial review of allegedly discriminatory fees imposed by a county-owned and operated airport, despite Congress's enactment of legislation regulating permissible fees.

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NORTHWEST AIRLINES, INC., ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are seven airline carriers (the Airlines) that brought suit in federal district court claiming that the user fees charged by Kent County International Airport (the Airport) are unreasonable and discriminatory, in violation of federal aviation laws, in particular, the Anti-Head Tax Act, 49 U.S.C. App. 1513(b). The Airlines also argue that the user fees violate the Commerce Clause of the Constitution. The court of appeals rejected the Airlines' claims.

(1)

1. Congress has enacted a comprehensive scheme of federal regulation and oversight of the Nation's airways and airports. The Federal Aviation Act (FAA) explicitly preempts all state and local regulation of "rates, routes, or services of any air carrier," while preserving the authority of States and political subdivisions, as airport owners and operators, to exercise their "proprietary powers and rights." 49 U.S.C. App. 1305(a)(1) and (b)(1). Another part of FAA, the Anti-Head Tax Act (AHTA), prohibits state and local governments from imposing so-called "head taxes" directly or indirectly on air passengers. 49 U.S.C. App. 1513(a) (1988 & Supp. III 1991).¹ AHTA, however, does not prohibit state and local governments that own or operate airports from collecting "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. 1513(b). The Secretary of Transportation (the Secretary) is authorized "to carry out the provisions of" FAA, 49 U.S.C. App. 1354(a), through, *inter alia*, the administrative investigation of complaints and enforcement actions in federal district court. See 49 U.S.C. App. 1482(a), 1487(a).

The Airport and Airway Improvement Act (AAIA) complements FAA. AAIA requires the Secretary to formulate a national airport system plan, one purpose of which is to ascertain airport development needs. 49 U.S.C. App. 2203 (1988 & Supp. III 1991). The statute also provides federal funds for airport development through the Airport and Airway Trust Fund, which is financed with tax revenues on air transportation and avia-

¹ The Anti-Head Tax Act was enacted in response to the Court's decision in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which sustained a \$1 service fee imposed on each commercial airline passenger flying out of the airport. See S. Rep. No. 12, 93d Cong., 1st Sess. 17 (1973). 49 U.S.C. App. 1513(a) and (b) are reproduced in the appendix to this brief.

tion fuel. 49 U.S.C. App. 2204 (1988 & Supp. III 1991); 26 U.S.C. 9502 (1988 & Supp. III 1991). The Secretary may approve an application seeking a grant of federal funds for an airport development project only if the airport provides specified written "assurances." 49 U.S.C. App. 2210(a). For example, the project sponsor must assure the Secretary that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and that "each air carrier * * * shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation * * * as are applicable to all such air carriers which make similar use of such airport." 49 U.S.C. App. 2210(a)(1). AAIA authorizes the Secretary to prescribe requirements and conduct investigations to ensure compliance with the assurances provided by airport project sponsors. 49 U.S.C. 2210(b), 2218(a).²

2. Respondent charges the Airlines landing and aircraft parking fees for their runway use, rent for the terminal space they occupy, and 100% of the Airport's cost of providing "crash, fire, and rescue" service (CFR). Pet. App. 28a. Respondent also charges general aviation (corporate and private aircraft) a "fuel flowage fee," and charges concessions (restaurants, parking lots, etc.) a percentage of their gross receipts. *Id.* at 25a, 29a. The revenues generated from the concessions substantially exceed the concessions' allocated costs and thus yield a sizable surplus. The surplus is used to offset shortfalls and is placed in the Airport's reserve fund for contingencies. *Id.* at 9a, 29a.

The Airlines sought a declaratory judgment that the landing fees, terminal rental rates, and other charges as-

² The Secretary has adopted regulations for investigations and enforcement actions under both FAA and AAIA. See 14 C.F.R. Pt. 13.

sessed by the Airport as of April 1988 are unreasonable and thus unlawful under AHTA and AAIA, and that they impose an undue burden on interstate commerce in violation of the Commerce Clause.³ Pet. App. 24a, 47a-48a. The Airlines contended that the Airport's rate methodology results in unreasonable rates and profits that greatly exceed the Airport's costs. The Airlines also argued that surplus revenues generated from the fees paid by concessions should be "cross-credited" to the Airlines so as to reduce the latter's fees. Finally, the Airlines claimed that the Airport undercharges general aviation in several respects, thereby discriminating against interstate commercial traffic. *Id.* at 30a.

3. The district court ruled in favor of the Airport. As a threshold matter, the court held that the Airlines have an implied private right of action under AHTA to challenge the Airport's user fees. Pet. App. 44a. The court concluded that there is no such right of action under AAIA, however, because Congress has delegated the responsibility for enforcing that statute to the Secretary. *Id.* at 44a-46a.

On the merits, the district court determined that the Airport's fees are reasonable under AHTA. The court held that, because AHTA refers only to fees charged to "aircraft operators," it does not require cross-crediting of the surplus concession fees in order to lessen the Airlines' own charges. Pet. App. 32a, 36a. In reviewing the fees charged to the Airlines, the court found those fees, with one exception, to be reasonable relative to the benefits conferred. *Id.* at 37a-38a. It concluded that 100% of CFR costs could properly be charged to the Airlines because such expenses are incurred solely due to the presence of commercial airlines at the Airport. *Id.* at 37a. It also rejected the Airlines' claim that the Airport's fee structure discriminates in favor of general aviation, noting

³ The Commerce Clause states that Congress has the "Power * * * To regulate Commerce with foreign Nations, and among the several States * * *." U.S. Const. Art. I, § 8, Cl. 3.

that the Airport does not recover the shortfall resulting from the undercharge of general aviation from fees assessed against the Airlines. *Id.* at 38a.

Finally, the court found that the Airlines' fees were not subject to Commerce Clause scrutiny, because Congress has acted to regulate airport user fees in AHTA. Pet. App. 46a.

4. The court of appeals affirmed most of the district court's judgment, reversing and remanding only for the proper allocation of CFR costs between the Airlines and general aviation.⁴ Pet. App. 17a. The court of appeals agreed with the district court that the Airlines could assert an implied private right of action under AHTA. *Id.* at 4a-6a. The court declined, however, to confer standing on the Airlines to assert claims on behalf of passengers or nonairline users of the Airport. *Id.* at 7a-8a.

In addressing the reasonableness of the Airport's fees under AHTA, the court of appeals found that "[n]on-airline concessions are not within the scope" of the statute. Pet. App. 9a. The court thus concluded that the surplus revenue resulting from concession fees need not be cross-credited to the Airlines to reduce their own charges. *Id.* at 10a. The court also determined that the Airlines are allocated and charged their fair share of the Airport's costs in connection with terminal and other public spaces. *Id.* at 11a-12a. In addition, the court found no basis in AHTA for altering the allocation of costs to general aviation. Although respondent charges the Airlines 100% of the costs attributable to their airside operations (*e.g.*, use of the runways, hangars, and terminal apron) but assesses general aviation only 20% of its corresponding airside costs, the court of appeals concluded that the dis-

⁴ Judge Kennedy authored the court's opinion on all issues except for the challenge to the general aviation fees; on that issue, Judge Contie authored the majority opinion. Pet. App. 18a. Judge Nelson dissented with respect to the court's rejection of the Airport's allocation of CFR fees. *Id.* at 20a.

parity does not make the Airlines' fees unreasonable under AHTA, because the Airlines are not required to make up the difference. *Id.* at 18a-20a.

Finally, the court of appeals declined to conduct an independent analysis of the challenged user fees under the Commerce Clause. It concluded that, in enacting AHTA, Congress "established clear guidelines for the fees and rates" that airports charge, thus foreclosing Commerce Clause review. Pet. App. 16a-17a.⁵

DISCUSSION

Petitioners seek this Court's review to clarify the standards under AHTA for assessing the reasonableness of user fees imposed on commercial airlines by airports, and to determine whether fees that pass muster under AHTA are also subject to challenge under the Commerce Clause. In our view, this Court's review is not warranted. The general approach taken by the court of appeals in this case does not conflict with federal law and policy. And, while the interpretation of AHTA by the court of appeals in this case does differ from that of the Seventh Circuit in *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (1984), the significance of that case is limited by its facts, including the court's finding that the airport in that case enjoyed monopoly power, and there has been relatively little litigation, apart from those two decisions, concerning airport fee structures.

Moreover, we believe that the standards in this complex regulatory area should be developed in the first instance by the Secretary of Transportation, who is charged with responsibility to investigate complaints regarding airline user fees and whose decisions are subject to judicial

⁵ Chief Judge Merritt dissented (Pet. App. 62a-63a) from the court of appeals' decision to deny rehearing en banc (*id.* at 60a) only with respect to the panel's decision concerning the allocation of the costs of CFR services. His dissent did not address any issue relevant to petitioners' claims in this Court.

review. Although the court of appeals allowed petitioners to proceed directly to federal court, we believe that there is no basis for finding an implied private right of action to enforce the reasonable-fee provision of AHTA, and the formulation of standards by the courts in the first instance threatens to conflict with the Secretary's authority to administer the statute. Although the implied-right issue may eventually warrant review, in view of the paucity of decided cases considering it and the fact that it is unlikely that administrative review would have produced a different outcome in this case, we believe that the petition should be denied.

1. Petitioners' principal complaint (Pet. 5-7, 17 n.11) is that, in determining whether the fees charged to the Airlines are reasonable under AHTA, the court of appeals did not take into account the revenues generated from the Airport concessions. The Airlines argue that, because the concession fees yield a return greater than the Airport's allocated costs, the surplus should be used to defray the fees charged to the Airlines. The court of appeals concluded, however, that AHTA, 49 U.S.C. App. 1513(b), speaks only to fees collected from "aircraft operators," and concession revenues are therefore not required to be considered in evaluating the reasonableness of the fees paid by the Airlines. Pet. App. 9a-10a.

The court of appeals' analysis is consistent with AHTA. The statute prohibits direct or indirect head taxes on persons traveling in air commerce, 49 U.S.C. App. 1513(a) (1988 & Supp. III 1991), but explicitly permits airports to collect "reasonable rental charges, landing fees, and other service charges from *aircraft operators* for use of airport facilities." 49 U.S.C. App. 1513(b) (emphasis added). AHTA thus focuses on the reasonableness of charges assessed against aircraft operators, such as the Airlines, and does not address the reasonableness of fees collected from concessions.

Other provisions of federal law dictate that airports "be available for public use on fair and reasonable terms

and without unjust discrimination," and that air carriers be subject to nondiscriminatory fees for airport facilities "directly and substantially related to providing air transportation." 49 U.S.C. App. 2210(a)(1). The Secretary's policy is that rates and charges should ordinarily correspond to the costs incurred in providing such facilities and services, but airports are given wide latitude in selecting a particular rate methodology and fee structure. As long as the charges to air carriers do not result in revenues that exceed by more than a reasonable margin an airport's costs in servicing those carriers—as appears to be the case here—the charges would be found reasonable under federal aviation law. See FAA, *Airport Compliance Requirements*, Order 5190.6A, § 4-14, at 20-22; App. 5, § a (defining "aeronautical activity") (Oct. 2, 1989). And, under federal law, as "a condition precedent to approval of an airport development project," revenues generated from all airport users (including concessions such as parking lots and restaurants) must make the airport as self-sustaining as possible and must be spent on the airport's capital or operating costs. 49 U.S.C. App. 2210(a)(9) and (12). There is no indication that that is not the case here.

The Airlines also complain (Pet. 6-7) that, while they are charged for 100% of their allocated costs, general aviation is assessed fees that correspond to substantially less of its fair share of the Airport's costs, resulting in discrimination against the Airlines. The court of appeals disagreed, however, because the shortfall in the costs attributable to general aviation is made up from excess concession revenues, not charges to the Airlines. Pet. App. 18a-20a.

The court's analysis is consistent with the factors the Secretary would consider in determining whether particular airport user fees are unjustly discriminatory. The Secretary's primary concern is that a commercial air carrier is not assessed charges substantially *higher* than either its

own properly allocated costs, or the fees charged to other such air carriers making similar use of the airport. See 49 U.S.C. App. 2210(a)(1). In this case, the Airlines' fees approximate the costs related to their own use of the Airport's facilities. The charges to general aviation are *lower* than its allocated costs, but are not subsidized by the Airlines. General aviation's use of the Airport is also not similar to that of the commercial Airlines. Thus, on the basis of this record, there does not appear to be any "unjust discrimination" under applicable federal law.⁶ 49 U.S.C. App. 2210(a)(1).

2. The threshold issue, however, is which body should address the issue of reasonableness in the first instance: the courts or the Secretary. Both the district court and the court of appeals ruled that the Airlines have a private right of action under AHTA. Pet. App. 42a-46a, 4a-6a. Although we do not urge that the petition be granted in order to resolve that issue now, we believe that there is no private right of action to challenge the reasonableness of an airport's user fees under AHTA.

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Court identified several factors bearing on whether an implied private right of action exists. Since that decision, the

⁶ Petitioners claim (Pet. 16-17) that the court of appeals misapplied the analysis of *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-717 (1972), in determining that the Airport's fees are reasonable under AHTA. Pet. App. 11a-12a. That contention lacks merit. As we have indicated, the court did not err in finding the fees to be fair in light of the Airport's cost of providing facilities to the Airlines and the benefits provided to the Airlines. Nor are the Airport's fees discriminatory against interstate users, simply because general aviation is assessed fees at a lesser rate than commercial aviation. Quite apart from the fact that the fee differential does not facially distinguish between interstate and intrastate travel (and there is no finding that it would do so in practice), a difference in fees assessed on general and commercial aviation existed in *Evansville* as well, 405 U.S. at 718-719, yet the Court found no discrimination against interstate commerce. *Id.* at 717.

Court has explained that "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576 (1979); *Suter v. Artist M*, 112 S. Ct. 1360, 1370 (1992). Determining congressional intent "is basically a matter of statutory construction," *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979), requiring consideration of the language, structure, and legislative history of the statute, especially the enforcement and remedial provisions. *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 536 (1989); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). Unless Congress's intent to create a cause of action "can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981).

The language and structure of both FAA (of which AHTA is a part) and AAIA establish a comprehensive and interwoven scheme of federal regulation of the nation's airways and airports. The clear intent of Congress, reflected in these statutes, is that an airline's complaint about a federally funded airport's user fees must be resolved in the first instance by the Secretary, so as to achieve uniformity in the oversight of the nation's airways and airports. There is no basis for inferring a congressional intent to create a cause of action, directly enforceable in the courts, under AHTA's reasonableness provision.⁷

⁷ A few other decisions have concluded (or assumed) that airlines have a private right of action under AHTA. See *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 15-16 (1st Cir. 1987); *Indianapolis Airport Auth.*, 733 F.2d at 1265-1266 (addressing the AHTA issue without analysis of implied-right

a. The pertinent language of AHTA contains no reference to any enforcement mechanism, either in the courts or by the Secretary. It simply prohibits direct or indirect head taxes⁸ and provides that state-owned or operated airports are not barred from collecting "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. 1513(a) and (b).

The court of appeals inferred, from the absence of any mention of the Secretary or an administrative enforcement scheme in Section 1513(a) or (b), a congressional intent to allow a private cause of action directly in the courts, without exhaustion of administrative remedies. Pet. App. 5a. "But implying a private right of action on

issue); *Rocky Mountain Airways v. County of Pitkin*, 674 F. Supp. 312, 314-316 (D. Colo. 1987); *Niagara Frontier Transp. Auth. v. Eastern Airlines, Inc.*, 658 F. Supp. 247, 249-251 (W.D.N.Y. 1987); *City & County of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834 (D. Colo. 1989) (implied right assumed without discussion); *Island Aviation, Inc. v. Guam Airport Auth.*, 562 F. Supp. 951, 960 (D. Guam 1982). In our view, those decisions mistakenly failed to appreciate or acknowledge the administrative remedy that Congress provided.

This Court has never addressed the issue. Although the Court has decided cases raising preemption claims under AHTA, none of those cases involved a request for federal court adjudication of the reasonableness of fees under 49 U.S.C. App. 1513(b) and none discussed whether an implied private right of action existed. See *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987) (ruling on lawfulness of state tax under 49 U.S.C. App. 1513(d)); *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986) (preemption claim with respect to aviation fuel tax imposed on foreign air carrier); *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983) (preemption challenge under 49 U.S.C. App. 1513(a) to tax on airline's gross revenues).

⁸ In 1990, Congress added a new subsection (e) to Section 1513, in which the Secretary is specifically delegated certain responsibilities. The new provision grants a limited right to public agencies to impose head taxes to finance "eligible airport-related projects," subject to the Secretary's approval. 49 U.S.C. App. 1513(e) (Supp. III 1991).

the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross*, 442 U.S. at 571. While it is certainly true that Congress intended to benefit airline passengers by prohibiting head taxes and requiring user fees imposed on airlines to be "reasonable," see *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 16 (1st Cir. 1987), that factor alone does not support the inference that Congress must have intended the airlines to have a direct *judicial* remedy to attain that end. See *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2763-2764 (1991). And other evidence indicates that no such remedy was intended.

b. The structure of the statute cuts against the conclusion that Congress intended that courts determine the reasonableness of airline user fees in the first instance. While AHTA does not explicitly provide for administrative review of airline fees by the Secretary, an administrative remedy already existed in FAA and is applicable to claims under AHTA.

AHTA was enacted as part of the Airport Development Acceleration Act of 1973 (ADAA), one purpose of which was "to amend the *Federal Aviation Act of 1958* * * * to prohibit certain State taxation of persons in air commerce." Pub. L. No. 93-44, 87 Stat. 88 (1973) (emphasis added).⁹ The incorporation of AHTA into FAA was deliberately designed to take advantage of the Secretary's expertise. As the Senate Legislative Counsel explained, amending FAA, "under which the Federal Government exercises its authority * * * to regulate air transportation, * * * would be the most appropriate method of exercising the authority to pre-empt State and local taxation of passengers engaged in air transportation in the interests of the needs and proper regulation of such

⁹ To that end, Congress added a new Section 1113 to Title XI of FAA, now codified at 49 U.S.C. App. 1513(a), (b), and (c). Pub. L. No. 93-44, § 7(a), 87 Stat. 90.

transportation." S. Rep. No. 12, 93d Cong., 1st Sess. 25 (1973).

At the time AHTA was enacted, FAA authorized the Federal Aviation Administrator to conduct investigations, to issue orders, and to promulgate regulations necessary to carry out the provisions of that statute. 49 U.S.C. 1354(a), (b), and (c) (1970). It also provided that any person could file a written complaint with the Administrator concerning the alleged violation of *any* provision of FAA, subject to review in the court of appeals. 49 U.S.C. 1482(a), 1486(a) (1970). Virtually identical provisions exist within FAA today and are implemented by regulations promulgated by the Secretary. See 49 U.S.C. App. 1354(a), (b), and (c); 1482(a); 1486(a); see also 14 C.F.R. Pt. 13. The fact that an administrative remedy for the Airlines' complaint was in place at the time AHTA was enacted as an amendment to FAA is a strong indication of Congress's intent not to create an additional right of action in the courts.¹⁰ See *Middlesex*, 453 U.S. at 14; *Transamerica*, 444 U.S. at 19.

The statute further demonstrates that, "when Congress wished to provide a private * * * remedy, it knew how to do so and did so expressly." *Touche Ross*, 442 U.S. at 572. In 49 U.S.C. App. 1487(a), Congress specifically authorized "any party in interest"—as distinguished from the Secretary or the Attorney General—to seek enforcement of Section 1371(a), relating to certificates of public convenience and necessity, in federal district court. Enforcement of the remainder of FAA, however, is explicitly entrusted to the Secretary (through administrative or ju-

¹⁰ Indeed, the Secretary has entertained a challenge to landing fees based on an alleged violation of AHTA. See *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 160 (1st Cir. 1989) (noting Secretary's institution of a proceeding to consider, *inter alia*, "whether [an airport's] new landing fee structure violates the Anti-Head Tax Act * * *"). The Secretary ultimately concluded that the landing fees in question did not constitute a head tax. 883 F.2d at 170.

dicial action) or to the Attorney General. See 49 U.S.C. App. 1482, 1487(a). The express grant of a private right of action in Section 1487 is strong evidence of Congress's intent to limit that type of remedy to the instance specified; courts should not supply, by implication, similar remedies elsewhere.

c. The legislative history of AHTA lends no support to the notion that Congress intended the statute to be enforced directly through the courts, rather than through the administrative complaint mechanism existing within FAA. The committee reports contain no discussion regarding any enforcement mechanism, let alone a private right of action. S. Rep. No. 12, *supra*, at 17-26; H.R. Rep. No. 157, 93d Cong., 1st Sess. 2-3, 4-5, 10 (1973); H.R. Conf. Rep. No. 225, 93d Cong., 1st Sess. 5-6 (1973). See *Touche Ross*, 442 U.S. at 571. AHTA's legislative history, however, does reflect Congress's intent to establish "a uniform national program of taxation and funding for airport improvements," which had already begun under the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 (repealed; formerly codified at 49 U.S.C. 1701 *et seq.* (1970)), the predecessor to AAIA. S. Rep. No. 12, *supra*, at 21. The Senate Report stresses the role of the federal government as a major participant in airport development and financing. *Id.* at 25-26. A congressional intent to create a private right of action for airlines to challenge an airport's user fees would be wholly inconsistent with the enhanced role for the federal government that Congress clearly envisioned when it enacted AHTA.

d. Not only do the language, structure, and legislative history of FAA and AHTA reveal no congressional intent to create a private right of action to challenge the reasonableness of airport user fees, such a remedy would be incompatible with the companion legislation enacted in AAIA. As petitioners acknowledge, "Congress intended the AHTA to be read in conjunction with" AAIA. Pet. 17 n.11.

AAIA establishes a major role for the Secretary in the development and financing of the nation's airports and contains its own administrative and judicial review procedures. The Secretary approves federal funding for such projects only when their sponsors provide assurances that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and that the rent and other fees charged to "air carriers" will be "nondiscriminatory." 49 U.S.C. App. 2210(a)(1). In addition, the fee structure must make the airport as self-sustaining as possible, and *all* revenues (from concessions and carriers alike) must be used for the capital or operating costs of the airport. 49 U.S.C. 2210(a)(9), (12). If a project sponsor violates an assurance, the Secretary may investigate the matter at a hearing, and if warranted, withhold funding. 49 U.S.C. App. 2218(a), (b)(1). An airport project sponsor may seek review of a decision to withhold funding in a court of appeals. 49 U.S.C. App. 2218(b)(4).

Thus, under AAIA, the Secretary is authorized to assess whether an airport's user fees are reasonable, not unjustly discriminatory, and put to proper purposes.¹¹ Finding an additional right of action under AHTA for airlines to challenge the same fees directly in court undermines the Secretary's role under AAIA and creates confusion and the potential for conflicting decisions by the Secretary and the courts. See, e.g., *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 158-159 (1st Cir. 1989) (discussing confusion by parallel institution of judicial and administrative proceedings). Requiring that complaints be first presented to the Secretary eliminates that possibility and ensures the uni-

¹¹ The Department of Transportation advises us that virtually all of the Nation's airports serving commercial airlines have development projects that implicate the requirements of 49 U.S.C. App. 2210.

formity in oversight of the nation's airports and airways that Congress intended.¹²

Providing for administrative determination of the reasonableness of airport fees is logical. The Secretary has broad authority to remedy unreasonable or unjustly discriminatory airport user fees. As the court in *Indianapolis Airport Auth.*, 733 F.2d at 1270, recognized, "the powers of a federal court in regulating rates are more limited than those of an administrative agency." Moreover, by exercising authority delegated by AAIA to withhold federal funds, the Secretary has significant leverage over airports to achieve the establishment of reasonable rental charges and other fees.

3. Petitioners contend (Pet. 13-16) that this Court's review is warranted to resolve a conflict between the decision below and the Seventh Circuit's decision in *Indianapolis Airport Auth.*, *supra*. In that case, the court of appeals concluded that the airline fees at issue were "unreasonable under the applicable state and federal standards," 733 F.2d at 1266, because the airport's concession fees were in excess of the costs of service furnished, were borne by the passengers, and, when added to the fees imposed on airlines, were "wholly disproportionate to the costs to the airport of serving the airlines and their passengers." *Id.* at 1268. The court also found the disparity between fees charged to commercial airlines and to general aviation to raise concerns about discrimination against interstate commerce. *Id.* at 1271.

¹² Congress confirmed that it expects the Secretary to rule on the lawfulness of airport fee structures in Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 100-457, 102 Stat. 2125 (1988). There, Congress explicitly acknowledged the Secretary's role in determining whether an airport's landing fee structure is consistent with both FAA and AAIA and established a date by which the Secretary was to issue such a decision in a case involving Boston's Logan International Airport. 102 Stat. 2130-2131.

Although the general approach of the Seventh Circuit differs from that taken by the court of appeals here, the tension does not warrant resolution by this Court. First, the precedential significance of *Indianapolis Airport Auth.* is limited by the court's emphasis on the fact that the airport in that case enjoyed monopoly power and was therefore in a position to charge a monopoly price. 733 F.2d at 1266-1267. The court of appeals here distinguished *Indianapolis Airport Auth.* on that basis, Pet. App. 9a-10a, and, of the few federal decisions addressing reasonableness issues, none appears to have followed the Seventh Circuit's approach. At all events, as we have explained, we believe that the standards of reasonableness under AHTA should be formulated administratively, not through direct judicial decisionmaking. That is the proper course for development of more uniform standards, rather than an undertaking by this Court to address those questions in the absence of an administrative determination.

4. Finally, petitioners contend (Pet. 18-19) that the court of appeals erred in declining to review the Airport's fee structure under the Commerce Clause. That claim does not merit review. The court's decision is consistent with those of the two other circuits that have addressed the question. See *New England Found.*, 883 F.2d at 174, 176; *Indianapolis Airport Auth.*, 733 F.2d at 1266.¹³ The decision also accords with this Court's precedents.

¹³ Petitioners claim (Pet. 15) that the decision conflicts with *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992) (per curiam), and *Alamo-Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), cert. denied, 498 U.S. 1120 (1991). In those cases, the courts undertook a Commerce Clause review of user fees charged to car rental companies. AHTA—which pertains to reasonable charges collected from "aircraft operators"—was not implicated in either case. Even if we assume that those decisions were correct in conducting a Commerce Clause analysis at the behest of those non-aircraft parties, petitioners have no standing to raise such claims. See Pet. App. 7a-8a.

In *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946), the Court held that, when Congress has exercised its power under the Commerce Clause, a court is "not required to determine whether [a state] tax would be valid in the dormancy of Congress' power. For Congress has expressly stated its intent and policy in the Act." The Court reaffirmed that principle in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982):

Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.

More recently, the Court has said that Congress's intent to exempt a state regulation or tax from Commerce Clause analysis must be "expressly stated," *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982), and "unambiguous," *Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992).

Although petitioners assert (Pet. 18-19) that AHTA is not sufficiently "express," the comprehensive scheme of federal regulation and oversight of the Nation's airways and airports, set forth in FAA, AHTA, and AAIA, leaves no doubt that Congress has acted and "struck the balance it deems appropriate." *Merrion*, 455 U.S. at 154. See S. Rep. No. 12, *supra*, at 25 (Congress has exercised its Commerce Clause authority in the field of air transportation by enacting FAA and AHTA).¹⁴ Petitioners

¹⁴ Petitioners' reliance (Pet. 19 n.12) on *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986), is misplaced. That case stated only that it was "plausible that Congress never considered whether States should be permitted to impose sales taxes on foreign, as opposed to domestic, carriers." *Id.* at 7. The clear

err in contending that, if the court of appeals correctly concluded that AHTA does not apply to charges assessed to non-airline concessions, review under the Commerce Clause must be undertaken at least as to those fees. Irrespective of the scope of AHTA, it is clear that in AAIA Congress has explicitly and unambiguously addressed the subject of airport fees and rentals charged to all airport users.¹⁵ See 49 U.S.C. App. 2210(a)(1), (9), (12). The court of appeals therefore correctly found that Commerce Clause review is foreclosed.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 1993

implication of the opinion is that 49 U.S.C. App. 1513 *does* answer the Commerce Clause issue as to taxes and user fees imposed on domestic carriers.

¹⁵ AAIA is more comprehensive in its coverage of fees than were the predecessor provisions in force at the time this Court decided *Evansville*, *supra*.

APPENDIX

49 U.S.C. App. 1513(a) and (b) (1988 & Supp. III 1991) provide:

§ 1513. State taxation of air commerce

(a) Prohibition; exemption

No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except as provided in subsection (e) of this section and except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Permissible State taxes and fees

Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or posses-

(1a)

sions of the United States or political agencies of two or more States) from the levy or collection of taxes, franchise taxes, and scales or use taxes on of this section, including property taxes, net income taxes, franchise taxes, and scales or the use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

No. 92-97

Supreme Court, U.S.
FILED

MAY 24 1993

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC.,
USAIR, INC., AMERICAN AIRLINES, INC., and UNITED
AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

At the Court's request, the Acting Solicitor General has expressed the views of the United States regarding the petition for a writ of certiorari in this case. *See* Brief for the United States as Amicus Curiae ("U.S. Brief"). In order to respond to that brief and to present information not available when petitioners (the "Airlines") made their last filing, the Airlines submit this supplemental brief in support of their petition. *See* S. Ct. Rule 15.7.

Significantly, the Acting Solicitor General does not dispute the nationwide importance of the statutory issue presented in this case. Neither does he deny that uniform

resolution of that issue is important. Nor does he challenge our submission that the lower courts are in conflict over that issue. Instead, he contends only that the Sixth Circuit's resolution of the issue is consistent with federal policy. While we dispute that that is so, it in no way responds to our contention that the issue is important and that a conflict exists in the circuit courts over its resolution. Curiously, the only significant point the Acting Solicitor General makes is that, in his view, the Sixth Circuit—as well as every other court deciding this issue, *see* U.S. Brief 10-11 n.7—was incorrect in concluding that a private right of action is available to challenge the imposition of airport fees. Not only is this contention completely unresponsive to the issue presented in our Petition, but it is difficult to understand why the Acting Solicitor General makes the argument at all if he opposes review. Indeed, if he is correct in his view that the lower courts' decisions on this issue are uniformly erroneous, his assertion that review is not warranted is a surprising one given the importance of the issue. Finally, his assertion that petitioners' Commerce Clause argument is precluded by the statute at issue is directly contrary to this Court's precedents.

DISCUSSION

1. The United States asserts that the decision below “does not conflict with federal law and policy.” U.S. Brief 6. According to the United States, “[t]he Secretary's policy is that rates and charges should ordinarily correspond to the costs incurred in providing [airport] facilities and services” *Id.* at 8. But that is precisely the Airlines' argument. For it is undisputed that the rates and charges assessed by the Airport do not correspond to the costs it incurs in providing facilities and services. Quite to the contrary, the Airport is reaping what even the United States admits is a “sizable surplus.” *Id.* at 3. Moreover, as the United States acknowledges, it is also federal policy that a commercial air carrier not

be assessed charges substantially higher than its own “properly allocated costs.” *Id.* at 8-9. One would have thought these two concessions would cause the United States to argue that it is the Seventh Circuit in *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984), and not the Sixth Circuit here, that is in accord with “federal policy.” For it was the Seventh Circuit (through Judge Posner) that held that an airport is not permitted under the AHTA (49 U.S.C. App. § 1513) to earn vast surpluses far in excess of its costs, and it was the Seventh Circuit (through Judge Flaum) that held that airport costs are not “properly allocated” where the non-aeronautical users (concessionaires) are allocated *none* of an airport's airside costs.

2. Although the United States nevertheless suggests that the Sixth Circuit has correctly applied federal policy, it does not—and cannot—dispute that the Sixth and Seventh Circuits are in conflict on that issue. Indeed, the United States *confirms* that “the interpretation of AHTA by the court of appeals in this case does differ from that of the Seventh Circuit. . . .” U.S. Brief 6. *See also id.* at 17 (recognizing “tension” between the cases). The United States, however, argues that this conflict does not warrant the Court's review because *Indianapolis* “is limited by its facts” and because there has been “relatively little litigation” concerning airport fee structures. *Id.* at 6. Neither of these points is valid.

First, the Acting Solicitor General was correct in his initial assertion that the real difference between this case and *Indianapolis* lies in the courts' “interpretation of AHTA,” *id.*, not in the facts of the two cases. And although the Sixth Circuit purported to distinguish *Indianapolis* on the ground that the airport in that case enjoyed a locational monopoly, the actual question in both cases was whether the airports' similar policies regarding fees comported with the requirements of the AHTA. The

Seventh Circuit merely referred to monopoly power as an explanation of the *ability* of the airport to impose unreasonable fees, *not* as a prerequisite to the determination that such fees are unlawful. *See* Pet. 14 n.8. Had this case been brought in the Seventh Circuit, it is plain that the fact on which the United States relies to distinguish the case would not have affected the outcome and that *Indianapolis* would have compelled a different result. This case thus presents precisely the type of conflict on an important question of law which merits this Court's review.

Second, it is simply not the case that airport fee structures have generated relatively little litigation. Since this Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and the subsequent enactment of the AHTA, there have been numerous reported decisions construing the AHTA and the reasonableness of airport fees. *See* Pet. 15; U.S. Brief 10-11 n.7. Moreover, only recently, a similar case was filed against the Allentown, Pennsylvania airport, *Lehigh-Northampton Airport Authority v. USAir, Inc., et al.*, No. 93-CV-2026 (E.D. Pa., filed April 30, 1993), and attempts by the City of Los Angeles to apply significant profits from fees at Los Angeles International Airport to general city expenses will likely lead to litigation in the near future over the validity of those surpluses. *See* "Legality of Airport Proposals Questioned," *Los Angeles Daily News* (April 1, 1993). In any event, given the huge stakes presented in these cases and their importance to the precarious airline industry, other suits outside the Sixth Circuit will inevitably follow if this Court denies certiorari.

This Court should not wait for still further suits to resolve the important issue presented here. As the United States' own brief demonstrates, this case plainly involves a significant issue that has already divided the circuit courts and upon which there is a pressing need "to achieve uniformity." U.S. Brief 10. Although the United States

advocates achieving that uniformity in a different manner than do petitioners (through review by the Federal Aviation Administration), the requisite uniformity cannot be achieved without review by this Court, for there already exist two competing approaches in the circuits to the issues presented.

3. As noted, the United States spends the bulk of its brief discussing whether a "private right of action" exists under the AHTA (*see* U.S. Brief 9-16)—an issue upon which petitioners prevailed in the Court of Appeals, which was not discussed either in the petition for certiorari or in respondents' opposition, and on which no cross-petition was filed. To the extent that the issue is relevant and preserved, it militates in favor of granting certiorari in this case. Indeed, as noted, it is not clear why the United States has not urged the Court to do so, given the importance of the issue, the large number of lower courts that have decided it, and their unanimous view that a private right of action does exist. *See id.* at 10-11 n.7.

4. Finally, the United States confirms that under this Court's precedents, Commerce Clause review is mandated unless Congress has "expressly stated" its "unambiguous" intent to permit State regulation that would otherwise unduly burden interstate commerce. *See* U.S. Brief 18 (quoting *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982), and *Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992)). The Sixth Circuit, by contrast, held that Commerce Clause review is available only if "Congress ha[s] taken no other action to regulate the area." App. 16a. As petitioners have explained, when the *correct* standard is applied, it is unassailable that the AHTA evinces no "express" and "unambiguous" intent to foreclose Commerce Clause review over airport fees. *See* Pet. 19. To the contrary, Congress intended for the AHTA to set a *stricter* standard than this Court in *Evansville* had applied under the Commerce Clause, not to authorize actions that would otherwise violate that Clause. Although the United

States argues that the AHTA leaves "no doubt" that Congress intended to permit additional state taxation, it makes no effort to meet this Court's requirement that such intent be "expressly stated." The effort, of course, would be unavailing, for Congress has *not* expressly stated such an intent. The Sixth Circuit therefore plainly departed from this Court's precedents and erred in refusing even to conduct a Commerce Clause analysis of the excessive fees charged here.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari and petitioners' reply brief, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC.,
USAIR, INC., AMERICAN AIRLINES, INC., and UNITED
AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS, and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

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EDITOR'S NOTE

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
(GRAND RAPIDS)

Docket No. G88-243

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
PIEDMONT AVIATION, INC., COMAIR, INC., MIDWAY
AIRLINES, INC., USAIR, INC., and AMERICAN AIR-
LINES, INC., UNITED AIR LINES, INC., MIDWAY AIR-
LINES (1987), INC.,

Plaintiffs,

v.

COUNTY OF KENT, MICHIGAN, and
THE KENT COUNTY DEPT. OF AERONAUTICS,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1988		
4/1/88	1	COMPLAINT.
5/9/88	9	AMENDED COMPLAINT by Northwest Airlines, Inc., Simmons Airlines, Inc., Piedmont Aviation, Inc., Comair Inc., Fischer Bros. Aviation, Inc. d/b/a Midway Commuter; US Air, Inc., American Airlines, Inc. and United Air Lines, Inc. w/Certificate of Service
5/10/88	10	ANSWER, Affirmative Defenses, and Counter-claim of Deft. The Kent County Aeronautics Board w/Proof of Service
5/20/88	11	ANSWER to Amended Complaint by Deft. County of Kent
5/20/88	12	COUNTERCLAIM by Deft. County of Kent

DATE	NR.	PROCEEDINGS
5/31/88	16	ANSWER by Deft. Kent County Aeronautics Board to Amended Complaint, Affirmative Defenses, and Counter-claim of Deft. w/Proof of Service
6/27/88	19	REPLY by pltfs to deft Kent County Aeronautics Board's Counterclaim w/Affirm. Defenses, MOTION to Dismiss Counterclaim for Injunction and Certificate of Service
6/27/88	20	MOTION by pltfs to Dismiss w/Brief, Certificate of Service and attachments
10/12/88	28	JOINT F.R.C.P. 16 Status Conference Report
11/8/88	31	STIPULATION with reference to the landing fees, rental charges, and other payments to be made to the Airport by the airline Plaintiffs pending the decision of this Court —copies mailed to Atty. Hunting for dist.
11/9/88	34	SECOND AMENDED COMPLAINT by pltfs
12/16/88	40	TRANSCRIPT OF STATUS CONFERENCE BEFORE Judge Bell on 10-17-88
1989		
1/5/89	43	ANSWER to Second Amended Complaint, Affirmative Defenses and Counter-Claim of Deft., The Kent County Aeronautics board
1/13/89	46	MOTION FOR PARTIAL SUMMARY JUDGMENT of Kent County Cross-FRCP 56 Dismissing pltfs' Allegations as to the Illegality of Airport Methodology for Determining User Fees and Rental Rates; Affidavit of David L. Waichum in Support; Proof of Service; Notice of Motion set on 2-22-89 at 8:30 a.m.
1/13/89	47	MEMORANDUM IN SUPPORT of FRCP 56 Motion for partial Summary Judgment of deft County of Kent, Michigan (O/S) (pldg. #46)

DATE	NR.	PROCEEDINGS
1/13/89	48	MOTION FOR PARTIAL SUMMARY JUDGMENT of Airport Cross-FRCP 56 Dismissing pltfs' Allegations as to the Illegality of the Airport Methodology for Determining User Fees and Rental Rates; Affidavit of Robert M. Ross in Support w/ Exhibits A-1, B-1 & C-1; Notice of Hearing set for 2-22-89 at 8:30 a.m.; Proof of Service
1/13/89	49	MEMORANDUM IN SUPPORT of FRCP 56 Motion for partial Summary Judgment of Airport (O/S) (pldg. #48)
1/13/89	50	TABLE OF CONTENTS OF defts' Bench Book of Exhibits A-H
1/12/89	52	MOTION by pltfs. For Summary Judgment, Brief in Support (O/S) w/attach Exhibits, Affidavit of Daniel R. Hindes, Affidavit of Charles t. Horngren w/attach Exhibits, Affidavit of Richard K. Dompke
1/13/89	53	DEPOSITION TRANSCRIPT of Harold Peterson taken on 12-13-88 at Grand Rapids, Mi. in support of #52
1/13/89	54	DEPOSITION TRANSCRIPT of Sandra Doncal taken on 12-14-88 at Grand Rapids, Mi. in support of #52
1/13/89	55	AFFIDAVIT Of Ferdinand K. Levy In Support of Defts' FRCP 56 Motion for Partial Summary Judgment w/Exhibits A-D and Proof of Service
1/13/89	56	DEPOSITION EXHIBITS 1-4 In Support of Depositions #53 & #54
1/13/89	57	DEPOSITION EXHIBITS 5-10 In Support of Depositions #53 & #54
1/13/89	58	DEPOSITION EXHIBITS 11-25 In Support of Depositions #53 & #54

DATE	NR.	PROCEEDINGS
1/23/89	60	REPLY of Pltfs to Counterclaim of the Kent County Aeronautics Board; Certificate of Service
2/9/89	61	ANSWER of deft County of Kent to pltf's Second Amended Complaint and Affirmative Defenses; Proof of Service
2/9/89	62	REPLY MEMORANDUM of Deft. Kent County to Pltfs' Cro[s]s FRCP 56 Motion for summary Judgment w/Proof of Service
2/9/89	63	REPLY MEMORANDUM Of Deft. Airport in Support of FRCP 56 Motion For Partial Summary Judgment Dismissing Plaintiffs' Allegations As To The Illegality of the Airport User Fee and Rental Rate Methodology
2/9/89	64	AFFIDAVIT of Sandra L. Doncal in support of Reply Memorandum (#63)
2/9/89	65	SUPPLEMENTAL REPLY AFFIDAVIT Of Ferdinand K. Levy in Support of Defts' FRCP Motion For partial Summary Judgment
2/9/89	66	FRCP 56 AFFIDAVIT OF DEAN C. NITZ w/attchs
2/9/89	67	AFFIDAVIT of John F. Brown In Support of Defts' FRCP 56 Motion For Partial Summary Judgment Dismissing Plaintiffs' Allegations as To The Illegality of The Airport User Fee and Rental Rate Methodology w/ Exhibit A
2/9/89	68	SUPPLEMENTAL BENCH BOOK OF Exhibits by Defts'
2/9/89	70	BRIEF Of Airlines In Response to Memorandum of Deft, County of Kent w/unsigned Proof of Service & Attchs.
2/9/89	71	SUPPLEMENTAL AFFIDAVIT Of Richard K. Dompke w/unsigned Proof of Service w/Exhibits S,T,U,V

DATE	NR.	PROCEEDINGS
2/9/89	73	BRIEF of Airlines In Response To Memorandum and Motion For Partial Summary Judgment of the Kent County Aeronautics Board O/S w/unsigned Proof of Service w/attchs
2/22/89	—	ORAL ARGUMENTS held before Judge Bell; Cross-Motions; Partial Summary Judgment; taken under advisement
3/13/89	76	MOTION by Defts To Supplement The current FRCP 56 Record By Adding Items J,K,L, and M To Defendants' Bench Book of Exhibits In Support of Defendants' Motion For Partial Summary Judgment Regarding The Alleged Illegality of the Airport Rate-Making Methodology, or alternatively, Defendants' F.r.E. 201 Motion For the Taking of Judicial Notice of Said Items J,K,L, and M
3/13/89	77	LEGAL MEMORANDUM of Defts. In Support of #76
3/16/89	79	BRIEF IN OPPOSITION TO DEFTS' Motion to Supplement the Record or to Take Judicial Notice of Certain Documents by pltf Airlines w/Exhibit A
5/4/89	80	TRANSCRIPT by Court Reporter of Cross-Motions for Partial Summary Judgment heard by Judge Bell on 2-22-89
6/22/89	81	OPINION by Judge Bell denying pltf Airlines' motion for summary Judgment on limited issue; copies mailed to attys Mallette, Wagner, Hunting and Kay (15 pgs)
6/22/89	82	ORDER in accordance with Opinion dated 6-22-89; copies mailed to attys Mallette, Wagner, Hunting and Kay (1 pg)

DATE	NR.	PROCEEDINGS
1/2/90	98	MOTION by defendant Kent, County of; defendant Kent Cty Dept Aeronautics Board for summary judgment, for dismissal of all of pltfs' claims; Memorandum in Support (O/S) w/Exhibit A; Notice of Hearing for 1/18/90 at 9:00 a.m. in Lansing, MI; Proof of Service (lkd) [Entry date 01/03/90]
1/12/90	109	RENEWED MOTION by plaintiffs for partial summary judgment; Response Brief to defts' Renewed Motion for Summary Judgment and Motion to Dismiss and Renewal of Pltfs' Motion for Partial Summary Judgment (O/S); Notice of Hearing set for 1/18/90 at 9:00 a.m.; Certificate of Service (lkd)
1/12/90	109	RESPONSE by plaintiffs to defts' motion for summary judgment [98-1] and motion for dismissal of all of pltfs' claims [98-2] (ATTACHED AS BRIEF IN SUPPORT TO PLTFS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT (#109)) (lkd)
1/16/90	113	MEMORANDUM IN OPPOSITION (REPLY) by defendants to pltfs' response to defts' renewed motion for partial summary judgment [109-1]; pltfs' Exhibit 24; deposition exhibit #34 (lkd) [Entry date 01/17/90]
1/18/90	119	AFFIDAVIT (Original) of John F. Brown replacing affidavit [112-1] (ldm) [Entry date 01/22/90]
1/18/90	—	HEARING before Judge Robert Holmes Bell on defendant's motion to dismiss—granted in part and denied in part; plaintiff's motion for partial summary judgment—denied. Order to enter by the court. (ldm) [Entry date 01/22/90]

DATE	NR.	PROCEEDINGS
1/22/90	120	OPINION (7 pages) by Judge Robert Holmes Bell (copies mailed to Attys. Mallette, Wagner, Hunting & Kay) (ldm)
1/22/90	121	ORDER (2 pages) by Judge Robert Holmes Bell denying plaintiff's motion for partial summary judgment [109-1] granting defendant's motion for dismissal with regard to claims under the Airport and Airway Improvement Act and the Interstate Commerce Clause and denying defendants' motion to dismiss with regard to claims under Anti-Head Tax Act (copies mailed to Attys. Mallette, Wagner, Hunting & Kay) claims [98-2] (cc: all (ldm)
1/22/90	125	DEPOSITION (TRANSCRIPT) of Jerome J. Barnack taken on 11/17/89 at 9:00 a.m. in Grand Rapids, MI, filed by defendant Kent County Dept Aeronautics (received in Lansing on 1/24/90) (lkd) [Entry date 01/25/90] [Edit date 01/25/90]
1/22/90	126	DEPOSITION (TRANSCRIPT) of Paul Hegedus taken on 11/17/89 at 1:30 p.m. in Grand Rapids, MI, filed by defendant Kent County Dept Aeronautics (received in Lansing on 1/24/90) (lkd) [Entry date 01/25/90] [Edit date 01/25/90]
1/22/90	127	DEPOSITION (TRANSCRIPT) of Carolyn Carlton Lowe taken on 11/16/89 at 9:00 a.m. in Grand Rapids, MI, filed by defendant Kent County Dept Aeronautics (received in Lansing on 1/24/90) (lkd) [Entry date 01/25/90]
1/22/90	128	DEPOSITION (TRANSCRIPT) of John Sorenson taken on 11/15/89 at 9:00 a.m. in Grand Rapids, MI, filed by defendant Kent County Dept Aeronautics (received in Lansing on 1/24/90) (lkd) [Entry date 01/25/90]

DATE	NR.	PROCEEDINGS
1/22/90	129	DEPOSITION (TRANSCRIPT) of Charles W. Seaman taken on 12/14/89 at 8:00 p.m. in Grand Rapids, MI, filed by defendant Kent County Dept Aeronautics (received in Lansing on 1/24/90) (lkd) [Entry date 01/25/90]
1/30/90	130	STIPULATION AND ORDER regarding trial evidence (4 pgs) by Judge Robert Holmes Bell: (cc Bransdorfer for dist.) (lkd) [Entry date 01/31/90]
2/1/90	132	TRANSCRIPT filed by defendant Kent County Aeronautics Board of deposition of Daniel R. Hindes taken on 12/13/89 at Grand Rapids, MI. (ldm) [Entry date 02/05/90]
2/2/90	131	TRIAL BRIEFS submitted by defendants w/atchs. (ldm) [Entry date 02/05/90]
2/2/90	133	TRIAL BRIEFS submitted by plaintiff Airlines w/attached Exhibits and Proof of Svc. (ldm) [Entry date 02/05/90]
2/6/90	134	OBJECTIONS by plaintiff Airlines to introduction of evidence at trial, brief in support, and proof of svc. (ldm) [Entry date 02/09/90]
2/9/90	135	MEMORANDUM IN OPPOSITION by defendants re pltfs' objections to evidence regarding comparable airport data [134-1]; with attachments (lkd)
2/9/90	136	STIPULATION Regarding Interim Un-audited 1989 Financial Statements of the Airport w/proof of svc. (ldm) [Entry date 02/13/90]
2/12/90	137	PRETRIAL ORDER approved (41 pages) (copies mailed to Atty. Bransdorfer for dist.) (ldm) [Entry date 02/13/90]
2/12/90	—	NON-JURY TRIAL before Judge Robert Holmes Bell—Day 1 (ldm) [Entry date 02/13/90]

DATE	NR.	PROCEEDINGS
2/13/90	—	NON-JURY TRIAL—Day 2 (ldm) [Entry date 02/14/90]
2/14/90	—	NON-JURY TRIAL—Day 3 (ldm) [Entry date 02/16/90]
2/15/90	—	NON-JURY TRIAL—DAY 4 (ldm) [Entry date 02/22/90]
2/16/90	—	NON-JURY TRIAL—DAY 5 (ldm) [Entry date 02/22/90]
2/20/90	—	NON-JURY TRIAL—DAY 6 (ldm) [Entry date 02/22/90]
2/21/90	—	NON-JURY TRIAL—DAY 7—proofs completed—findings of fact and conclusion of law to be filed by 3-16-90. Oral arguments set for 3/21/90. (ldm) [Entry date 02/22/90]
2/28/90	139	STIPULATION as to Airport History (lkd)
3/6/90	141	MOTION by defendants Kent County & Kent Cty Dept Aeron to reopen supplement trial record by adding Exhibits 4A, 5 and 21 [141-1] notice of hearing on 3/20/90 at 1:30 p.m. at Lansing, MI (ldm)
3/16/90	142	PROPOSED FINDINGS OF FACT and PROPOSED CONCLUSIONS OF LAW submitted by defts; attachments
3/16/90	143	PROPOSED FINDINGS OF FACT and CONCLUSIONS OF LAW submitted by pltf Airlines
3/20/90	—	NON-JURY TRIAL—Day 8—closing arguments before Judge Robert Holmes Bell. Defendant's Motion GRANTED to supplement trial record by adding Exhibits 4A, 5 and 21 [141-1] and plaintiff's counter motion to add exhibits [144-1] DENIED—court to enter opinion. (ldm) [Entry date 03/22/90] [Edit date 03/23/90]

DATE	NR.	PROCEEDINGS
6/18/90	146	OPINION (20 pgs) by Judge Robert Holmes Bell (cc: Allard, Hunting, Wagner & Mallette) (lkd) [Entry date 06/21/90]
6/18/90	147	JUDGMENT: (2 pgs) by Judge Robert Holmes Bell terminating case; Court finds for defts on all allegations of pltfs' second amended complaint except for the allegation that the aircraft parking fee is unreasonable; Court finds for defts on their counterclaim; Ordered that defts recalculate the aircraft parking fee to recover funds equal to but not greater than the costs of providing the aircraft parking area; Ordered that pltfs are to pay defts the difference between the Prior Rates and the Ordinance Rates for the period of time from 4/1/88 to date of this judgment w/an adjustment for the overpayment of the aircraft parking fee; pltfs must pay the Ordinance Rates with the recalculation for the aircraft parking fee as of the date of this judgment (cc: Allard, Hunting, Wagner & Mallette) (lkd) [Entry date 06/21/90]
7/16/90	148	NOTICE OF APPEAL by pltfs' from Dist. Court decision entered on 6/18/90 except from that portion of the final judgment holding that the aircraft parking fee is unreasonable and Certificate of Service [147-2] (dmh) [Entry date 07/25/90]
8/31/90	160	TRANSCRIPT FOR hearing held 1-18-90 re cross-motions for summary judgment (rj) [Entry date 09/18/90]
8/31/90	161	TRIAL TRANSCRIPT INDEX filed (rj) [Entry date 09/18/90]
8/31/90	162-169	TRIAL TRANSCRIPT (Vol. I-Vol. VIII)

DATE	NR.	PROCEEDINGS
9/4/90	170	MEMORANDUM OPINION AND ORDER (5 pgs) w/Exhibit A setting forth computation of damages by Judge Robert Holmes Bell denying motion for entry of monetary, final judgment (including award of appropriate past interest), and MOTION to set aside the premature Notice of Appeal filed by pltfs' [157-1] (cc: all counsel on 9/14/90; remailed on 9/17/90 w/attached Ex A) (rj) [Entry date 09/18/90]
9/13/90	171	TRANSCRIPT of deposition of Mark W. Fischer taken 11-16-89 by deft Kent Co. Aeronautics Bd. (rj) [Entry date 09/18/90]
9/13/90	172	TRANSCRIPT of deposition of Robert M. Ross taken 12-12-89 (rj) [Entry date 09/18/90] [Edit date 09/19/90]
9/13/90	173	TRANSCRIPT of deposition of Robert M. Ross continued to 12-13-89 (rj) [Entry date 09/18/90] [Edit date 09/19/90]
9/13/90	174	TRANSCRIPT of deposition of Robert M. Ross continued to 12-14-89 (rj) [Entry date 09/18/90] [Edit date 09/19/90]
10/3/90	186	NOTICE OF APPEAL by plaintiffs' from Dist. Court decisions entered on 9/4/90, 6/18/90 and 1/22/90 [170-1] with certificate of service (dmh) [Entry date 10/10/90]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-2117

NORTHWEST AIRLINES, INC.; SIMMONS AIRLINES, INC.;
PIEDMONT AVIATION, INC.; COMAIR, INC.; MIDWAY
AIRLINES (1987), INC., formerly known as Fischer
Brothers Aviation, Inc.; USAIR, INC.; AMERICAN AIR-
LINES, INC.; UNITED AIR LINES, INC.,
Plaintiffs-Appellants

v.

COUNTY OF KENT, MICHIGAN; THE KENT COUNTY BOARD
OF AERONAUTICS; THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,
Defendants-Appellees

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/27/90	BRIEF filed by Malcolm C. Mallette for Appellants Northwest Airlines, Simmons Airlines, Piedmont Aviation, Comair, Midway Airlines, USAir, AA, United Air Lines in 90-1811/2117. Copies: 10. Certificate of service date 12/26/90 [90-1811, 90-2117] (teb) [90-1811 90-2117]
1/28/91	BRIEF filed by Mark S. Allard for Appellee Cnty of Kent in 90-2117/1811. Copies: 10. Certificate of service date 1/25/91 [90-2117, 90-1811] (teb) [90-1811 90-2117]
1/28/91	BRIEF filed by W. Fred Hunting for Appellee Kent Cnty Br of Aero, Kent Cnty Dept Aero in 90-2117/1811. Copies: 11. Certificate of service date 1/25/91 [90-2117, 90-1811] (teb) [90-1811 90-2117]

DATE	PROCEEDINGS
1/30/91	BRIEF TENDERED. Received from Thomas E. Devine for amicus curiae Airport Operators Council International [90-2117]. Certificate of service date 1/30/91 Corrections to be made: none; motion required for leave to file brief. (teb) [90-2117]
2/15/91	REPLY BRIEF filed by Malcolm C. Mallette and Mark S. Brandsdorfer for Appellants Northwest Airlines, Simmons Airlines, Piedmont Aviation, Comair, Midway Airlines, USAir, AA, United Air Lines in 90-1811/2117. Copies: 11. Certificate of service date 2/14/91 [90-1811, 90-2117] (teb) [90-1811 90-2117]
3/6/91	APPENDIX filed by Walter A. Smith for appellants. Copies: 5 [4 vols]. Certificate of service date 3/5/91 [90-1811, 90-2117] (pje) [90-1811 90-2117]
8/13/91	CERTIFIED RECORD filed. Volumes include 13 Tr; 12 Dep; 20 Pl. [90-1811, 90-2117] (dtk) [90-1811 90-2117]
9/6/91	ORDER filed granting motion to allow Airport Operators Council Intl. leave to file amicus curiae brief [375003-1] [90-1811, 90-2117]. Entered by order of the court. (stj) [90-1811 90-2117]
9/23/91	CAUSE ARGUED by Walter A. Smith for Appellant United Air Lines, Appellant AA, Appellant USAir, Appellant Midway Airlines, Appellant Comair, Appellant Piedmont Aviation, Appellant Simmons Airlines, Appellant Northwest Airlines in 90-2117, W. Fred Hunting for Appellee Kent Cnty Dept Aero, Appellee Kent Cnty Br of Aero in 90-2117 before Judges Kennedy, Nelson, Contie. [90-2117] (paw) [90-2117]
2/3/92	OPINION filed: REVERSED and remanded in order that the costs associated with CFR services may be properly allocated between the airlines

DATE	PROCEEDINGS
	and general aviation. With regard to the Airlines' claim that the concessions are under-assessed for their associated costs and that the Airlines are entitled to be cross-credited for surplus revenue generated by concession fees, the decision is AFFIRMED [90-1811, 90-2117]. Decision for publication. Cornelia G. Kennedy, Authoring Judge, David A. Nelson, dissenting, Leroy J. Contie, Senior Judge. (stj) [90-1811 90-2117]
2/3/92	JUDGMENT: AFFIRMED in part REVERSED and remanded [90-1811, 90-2117]. (stj) [90-1811 90-2117]
2/18/92	PETITION for en banc rehearing filed by Walter A. Smith for Appellant Northwest Airlines, et al. Certificate of service date 2/14/92. [90-1811, 90-2117] (blc) [90-1811 90-2117]
3/31/92	RESPONSE to a petition for en banc rehearing [547825-1]; previously filed by Walter A. Smith Jr., Walter A. Smith Jr. in 90-1811, 90-2117. Response filed by Mark S. Allard for Appellee Cnty of Kent in 90-1811, et al. Certificate of service date 3/30/92. [90-1811, 90-2117] (blc) [90-1811 90-2117]
4/16/92	ORDER filed denying petition for en banc rehearing. [90-1811, 90-2117] in 90-1811, 90-2117. Cornelia G. Kennedy, Circuit Judge, David A. Nelson, Circuit Judge, Leroy J. Contie, Senior Judge. (stj) [90-1811 90-2117]
5/7/92	ORDER (Dissent) filed: Chief Judge Merritt's dissent from failure to grant en banc rehearing for petition that was denied 4/16/92. [90-1811, 90-2117] (stj) [90-1811 90-2117]

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 90-1811, 90-2117

NORTHWEST AIRLINES, INC.; SIMMONS AIRLINES, INC.;
PIEDMONT AVIATION, INC.; COMAIR, INC.; MIDWAY
AIRLINES, INC.; USAIR, INC.; AMERICAN AIRLINES,
INC.; and UNITED AIRLINES, INC.,

Plaintiffs-Appellants,

v.

COUNTY OF KENT, MICHIGAN; THE KENT COUNTY
BOARD OF AERONAUTICS; and THE KENT COUNTY
DEPARTMENT OF AERONAUTICS,

Defendants-Appellees.

Argued Sept. 23, 1991

Decided Feb. 3, 1992

Douglas E. Wagner, Christopher C. Williams, Mark S. Brandsdorfer (briefed), Warner, Norcross & Judd, Grand Rapids, Mich., Walter A. Smith, Jr. (argued), Hogan & Hartson, Washington, D.C., Malcolm C. Mallette (briefed), James G. McIntire, Kreig, DeVault, Alexander & Capehart, Indianapolis, Ind., for plaintiffs-appellants.

Richard A. Kay, Mark S. Allard (briefed), Varnum, Riddering, Schmidt & Howlett, W. Fred Hunting, Jr. (argued), briefed, Robert A. Buchanan, Law, Weathers & Richardson, Grand Rapids, Mich., for defendants-appellees.

Before KENNEDY and NELSON, Circuit Judges, and
CONTIE, Senior Circuit Judge.

KENNEDY, Circuit Judge.

Northwest, Simmons, Piedmont Aviation, Comair, Midway, USAir, American and United Airlines dispute the landing fees, terminal building rental rates, carrying charges, and crash/fire/rescue charges assessed them at the Kent County International Airport serving Grand Rapids, Michigan. The Airlines also argue that surplus revenue generated by the fees charged non-airline concessions should be cross-credited to reduce the fees charged to the Airlines. For the reasons stated below, we REVERSE and REMAND to the District Court to determine the proper allocation of fees between the Airlines and general aviation in regard to crash, fire and rescue costs. We AFFIRM the District Court's dismissal of the Airlines' claims under the Airport and Airway Improvement Act of 1982 and the Commerce Clause, its finding that the Airlines have no right to be cross-credited for concession revenues, the finding that the allocation of terminal rental fees between the Airlines and concessions were reasonable, and the finding that the method the airport used to assess airside operation fees for general aviation and the Airlines was reasonable.

I.

The Kent County International Airport ("Airport") is operated by the Kent County Aeronautics Board and the Kent County Department of Aeronautics ("defendants"), both departments of Kent County. The County is the owner and landlord of the Airport and its facilities. The Airport was originally financed by the issuance of general obligation bonds which were later retired through a tax levy. The Airport is a relatively small hub airport whose primary passengers consist of people with Western Michigan origins or destinations. The Airport is serviced by Northwest, Simmons, Piedmont Aviation, Comair, Midway, USAir, American and United Airlines ("Airlines").

The accounting methodology used by the Airport views the Airport as the landlord, and all users as tenants. This accounting system, developed by James C. Buckley, is known as the Buckley or compensatory "methodology" and is widely used by airports.¹ The system is designed so that the Airlines are only charged for the land costs, physical facilities and other expenses which can be directly allocated to them. When using this system, the Airport first determines the cost basis of the land and facilities. Next, the usage of all areas is calculated and the various users are assigned rents that reflect their usage level. The costs are primarily divided among three groups: the Airlines, non-airline concessions, and general aviation.² These users enter into leases with the Airport which establishes the fees and rates to be charged.

The Airlines and the Airport negotiated and agreed on the fees to be charged through December 31, 1986. In 1986, a new rate study resulted in increased fees and the Airlines and Airport could not reach an agreement. Finally, on March 10, 1988, the airport passed an ordinance which unilaterally increased the fees. On April 1, 1988, this case was filed challenging the ordinance rates and the rates charged subsequent to December 31, 1986.³ The Airlines specifically dispute the landing fees of 70.21 cents per 1,000 lbs., the terminal building rental rates, the carrying charge, the fact that general aviation was

¹ See Report from James C. Buckley, *Fees for the Use of Public Aircraft Facilities and Rental for Passenger Terminal Premises, for Freight Terminal Premises, for Rentable Buildings, and for Ground Space: Kent County Airport*, (February 1969).

² The term "general aviation" encompasses corporate aircraft and privately owned aircraft that are not used for transportation of military, public passengers, or cargo. The District Court found that over 160 general aviation craft are based at the Kent County Airport. *Northwest Airlines, Inc. v. County of Kent, Mich.*, 738 F.Supp. 1112, 1114 (W.D.Mich.1990).

³ The Airlines amended their complaint on May 9, 1988 and again on November 9, 1988.

not also charged based on their costs, and the Airport's allegedly excessive fund balance.

II.

Prior to the trial in this case, the District Court ruled on cross motions for summary judgment. The District Court held that the Airlines did have a private right of action under the Anti-Head Tax Act ("AHTA") and denied the Airport's motion for summary judgment. It also held, however, that the Airlines had no right of action under the Airport and Airway Improvement Act or the Interstate Commerce Clause of the United States Constitution. We agree with the District Court.

The defendants first claim that the Airlines are precluded from challenging the current rates in federal court under either the AHTA or Airport and Airway Improvement Act of 1982 ("AAIA") because they failed to exhaust their administrative remedies. The defendants argue that the Airlines must first raise any claims with the Secretary of Transportation under the AAIA before any claims may be made in the District Court. In *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court established four factors to be used in determining whether Congress intended to create an implied right of action. These factors are:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78, 95 S.Ct. at 2088 (quoting *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916)) (emphasis in original; citations omitted). The Supreme Court has placed increasing emphasis on the second factor—the intent of Congress. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979); *Niagara Frontier Transp. Auth. v. Eastern Airlines Inc.*, 658 F. Supp. 247 (W.D.N.Y. 1987).

Several courts have found that the AHTA satisfies all the *Cort* factors and that a private right of action exists. *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir.1987); *Niagara*, 658 F.Supp. at 247. Most importantly, the intent of Congress to grant a private right of action seems inherent in the language of the statute satisfying the second *Cort* factor. The AHTA expressly prohibits states from levying "a tax, fee, head charge, or other charge, directly or indirectly. . . ." 49 U.S.C.A. App. § 1513(a) (West Supp.1991). As noted by the First Circuit, this statute does not mention the Secretary of Transportation nor an administrative or judicial enforcement scheme like those created in similar statutes. *Interface Group*, 816 F.2d at 16. In addition, the other *Cort* factors are also met. Private enforcement furthers the purposes of the statute by ensuring that airlines will file claims that individuals may lack the time and expenses to pursue. The AHTA also clearly identifies the class to be protected. We find that the Airlines had no duty to exhaust administrative remedies as to the statutory claims made under section 1513.

The Airlines face different administrative requirements under 49 U.S.C.A. App. § 2210, the AAIA. A review of the *Cort* factors indicate that Congress intended that there would be no private right of action under section 2210. The statute provides that assurances must be given to the Secretary of Transportation regarding the reasonable terms and rates of an airport development project.

49 U.S.C.A. App. § 2210 (West 1991); *Interface Group*, 816 F.2d at 15. This provision indicates that Congress intended to establish an administrative enforcement scheme.⁴ The AHTA and the AAIA do not cover similar issues or provide similar remedies. The AHTA addresses state taxation of air commerce for which recovery of unreasonable taxation or fees would be the remedy. The AAIA, on the other hand, requires certain assurances to be made prior to approval of an airport development project. Failure to make these assurances would result in denial of the grant. For this reason, all claims against the defendants under the AAIA were properly dismissed for failure to exhaust administrative remedies.

Second, the defendants assert that the Airlines are estopped or have waived their rights to object to the methodology and fees adopted by the defendants. They base this argument on the Airlines' failure to protest the fees during the twenty previous years. As support, they point to a December 22, 1983 letter from John Sorensen of United Airlines, then serving as the negotiator for all the Airlines, which they claim acknowledges the reasonableness of the rates. The defendants' argument is without merit.

⁴ The Airlines argue that they are entitled to claim the protection of section 2210 despite the language giving responsibility to the Secretary of Labor. They place reliance on *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 721, 92 S.Ct. 1349, 1357, 31 L.Ed.2d 620 (1972), which applies the predecessor to section 2210 in determining Congressional intent regarding airport fees. *Evansville* involved a suit by the airlines against an airport. The airlines in *Evansville*, protesting the fees being applied by the airport, filed suit claiming that the fees were an unconstitutional burden on interstate commerce. The predecessor to section 2210, 49 U.S.C.A. § 1718(a) (8), was referred to as evidence that Congress did not intend to deny or preempt state or local power to levy charges to defray the cost of an airport. No reference was made as to whether the airlines would have had a private right of action under section 1718.

The complaint filed by the Airlines clearly states that the protested fees were reportedly adopted on March 10, 1988 and became effective on April 1, 1988. The past fees referred to in the complaint are only those fees assessed subsequent to the contract which expired on December 31, 1986. The assessed fees do not represent rates which were agreed upon after negotiation. Rather, they are fees which were charged during the negotiation period. None of the protested fees or the requested remedies involves fees assessed under past contracts. The Airlines are not precluded from bringing a judicial challenge to rates because in the past they agreed to different assessed rates. The rates agreed to in the past are the result of negotiations between the Airlines, the County, and the Airport. *Northwest Airlines, Inc. v. County of Kent, Mich.*, 738 F.Supp. 1112, 1114 (W.D.Mich.1990). Only in 1988, when negotiations were unproductive, were these claims brought.

Finally, defendants argue that the Airlines do not have standing to raise issues based on rates, fees or charges to passengers and other non-aeronautical users of the airport. Defendants assert that the Airlines must show a causal connection between the damages they claim and the defendants' acts. *See In Re Air Passenger Computer Reservation Sys.*, 727 F.Supp. 564, 568 (C.D.Cal.1989). While it is clear that section 1513 gives the airlines a private right of action, the private right of action given in the statute to passengers may not be asserted by the airlines. The legislative history of the AHTA recognizes that by banning unreasonable taxes on the carriage of air passengers, the statute also prevents those unreasonable taxes from being passed on to the consumer. *See S.Rep. No. 12, 93d Cong. 1st Sess., reprinted in 1973 U.S. Code Cong. & Admin.News 1434, 1451; Interface Group*, 816 F.2d at 16. Thus, the airlines ensure fair rates in a situation where the charges may be passed through the airlines to the consumer. Individual consumers in these situations may not contest the charges because of finan-

cial or time constraints. However, this reasoning does not apply in cases where the charges are being assessed directly to the passengers or other airport users. In these cases, users felt the direct impact of the charges and many, such as the concessionaire, are capable of asserting the claims. For the above reasons, we find that the Airlines have no standing to assert the claims of the non-airline airport users or passengers.

III.

The AHTA prohibits the imposition of any fee on "persons traveling in air commerce or on the carriage of persons traveling in air commerce" which are unreasonable. 49 U.S.C.A. App. § 1513(a) (West Supp. 1991). Reasonable fees on "aircraft operators for the use of airport facilities" are allowed.⁵ The statute does not provide guidance for determining what constitutes a reasonable fee. The Seventh Circuit, in *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir.1984), held that fees "wholly disproportionate" to the costs of serving the airline and airline passengers were unreasonable. The plaintiffs have the burden of proving that the rates are unreasonable in light of the benefits conferred on them. *Evansville Airport v. Delta*

⁵ The text of section 1513 reads, in pertinent part,

(a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom;

(b) . . . [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 U.S.C.A. App. § 1513 (West Supp.1991).

Airlines, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972); *American Airlines, Inc. v. Massachusetts Port Auth.*, 560 F.2d 1036 (1st Cir.1977). Deference is given to the rates established by the state and administrative agencies as long as they act within a broad range of reasonableness. *Evansville*, 405 U.S. at 712-14, 92 S.Ct. at 1353-54.

A. Reasonableness of the Rates Charged to Concessions

The Airlines' argument suggests that overall the rates and fees established under the ordinance are inherently unreasonable because they result in a substantial profit for the Airport. The District Court found that the Airport had over \$9 million in reserves at the end of 1989. Concessions are all the non-aeronautical users: parking lot, car rentals, restaurants, motels, gift shops, advertising, and food services. The fees charged by the Airport to these concessions generate a surplus of \$2 million per year and result in a large reserve. The Airport views this surplus as a "contingency" fee to be used at a later time. The Airlines assert that this profit is prohibited by the AHTA and should properly be used to reduce the charges to the Airlines.

Non-airline concessions are not within the scope of the AHTA. As noted by the District Court, the statute does not mention concessions. Rather, section 1513(b) permits airports to charge reasonable fees and charges from *aircraft operators*. The Seventh Circuit opinion on which the Airlines rely for their assertions is distinguishable. In *Indianapolis Airport*, the court held that an ordinance was unreasonable which disregarded airport concession revenues when establishing the airline rates and fees. Such a result, wrote Judge Posner, is "wholly disproportionate to the costs to the airport of serving the airlines and their passengers, and is therefore unreasonable. . . ." 733 F.2d at 1268. Judge Posner relied on two factors in *Indianapolis Airport* which distinguish that case from the

one now before us. First, the Indianapolis airport serves in a monopoly environment. As judicially noticed by the District Court, Kent County Airport is located less than an hour and a half from two airports serviced by major airlines. This means that the passenger has some role in determining from which airport to travel. Second, the Seventh Circuit required the plaintiffs to prove that the rates imposed directly affected the airline or airline passengers and not other parties not parties to the case. As did the District Court, we find the reasoning articulated by the Colorado District Court in *City and County of Denver v. Continental Airlines, Inc.*, 712 F.Supp. 834 (D.Col.1989) persuasive:

Persons affected by the rates, rentals and charges for the restaurants, gift shops, parking lots and rental cars, include persons who are not air passengers. These accessory uses of the airport may be considered amenities for air passengers and convenient for them, but no person traveling to, from or through Stapleton on United or Continental flights is required to park in the parking lot, rent a car, eat at a restaurant or buy a magazine. Those are all individual decisions driven by individual perceptions of need and economic values. That is not the case with respect to the use of the airport's runways, taxiways, and airline portions of the terminal area. There, the air passenger is captive and her purse is necessarily and directly affected by Denver's charges to the airlines for those uses. Stated differently, Denver's decision to operate concessions at a profit is not an exploitation of airline passengers who have the freedom of choice to use the amenities Denver has provided.

712 F.Supp. at 838-39. We find that the AHTA does not apply to charges assessed to non-airline concessions and agree with the District Court that the Airlines may

not require the cross-credit of concession revenue surplus against their rates and fees.

B. Allocation of fair share costs to concessions

The Airlines were assessed nearly \$2 million in fees for 1988. This figure includes 76% of the costs of the passenger terminal building. The remaining 24% of the costs are allocated to concessions including restaurants, hotels, baggage carts and lockers.⁶ The cost allocation is based on floor space occupancy. The Airport asserts that the cost allocation of common space is made in the same proportion as the percentage of terminal space the user occupies exclusively. The Airlines respond that the Airport's cost allocation is unreasonable in violation of AHTA. The Airlines contend that the 76% allocation results in the Airlines paying for 100% of the public spaces. Appellant's Brief at 29 n. 46.

A fee assessed is reasonable as long as it is based on some fair approximation of the cost of providing the facilities and services, is relevant to the operation of the airport, and is not arbitrary and capricious, but is based on a uniform, fair and practical standard. See *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 712-14, 92 S.Ct. 1349, 1353-54, 31 L.Ed.2d 620 (1972), quoting *Hendrick v. Maryland*, 235 U.S. 610, 624, 35 S.Ct. 140, 143, 59 L.Ed. 385 (1915); *Massachusetts Port Auth.*, 560 F.2d at 1038. An assessment of costs for the common space need not depend on a district court's estimate of the benefits each renter derives from its customers' use of the common area. Although such a method would be a possible method for assessing costs, there is nothing in the Act that dictates that such a method *must* be used.

There is no support for the Airlines' assertion that they pay for 100% of the "public spaces" cost. The Airlines'

⁶ Some of the concessions, such as telephones and advertising space, are allocated no costs at all.

expert, Richard Dompke, testified that while 100% of the baggage claim area costs are allocated to the Airlines, the costs of common areas surrounding the restaurant, cocktail lounge, gift shop, and game room, are assigned to all users of the terminal building "on an equitable basis." Dompke also testified that part of concourse A has been designated as a public area, and that for this area, 76% had been charged to the Airlines. R.E. No. 162, pp. 163, 164. The Airport's witness, John F. Brown, stated that the Airlines are not charged at all for the space that is roped off where passengers line up to get their ticket and check in their luggage. The lease signed by the parties indicates that an airline must pay a rental rate based on a square footage basis for the ticket wings, concourse level, holding rooms, lounges, and office space which it occupies. Rental of the baggage claim and tag circulation area is apportioned between the users of these areas. Because there is no support in the record that 100% of the costs associated with all common areas of the terminal building are charged to the Airlines, the Airlines have failed to show that the terminal facility fees assessed to them are unreasonable. We therefore affirm the District Court on this issue.

C. Allocation of fair share costs to General Aviation

The \$2 million in fees for which the Airlines are assessed also reflects airside costs for runways, taxiways, and passenger terminal aprons. The Airport allocates these airside costs to general aviation and the Airlines. General aviation, however, is only assessed 20% of its allocated costs. General aviation should be assessed its full allocation of airside costs. The deliberate decision not to assess general aviation its full cost allocation of airside service costs discriminates against the Airlines in favor of locally owned aircraft. The Seventh Circuit, in *Indianapolis Airport*, held in a similar situation,

The difference in the Authority's treatment of airlines and private planes—making the former pay for the

full costs (and more!) that they impose on the airport, but through inaction, allowing the latter to get away with paying little more than half of the costs they impose—has not been justified. And since flights by private planes are more likely to be intrastate than airline flights are, the effect of leaving the flowage fee unchanged has been to shift some of the costs imposed by local users of the airport to its interstate users, who are, along with many of their customers, non-residents of [the state where the airport is located]. This is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act.

733 F.2d at 1271. The fact that concession revenues compensate for the underassessment does not justify the discrimination. The concession revenues could be used to purchase improvements or additional equipment that would potentially benefit both the concessions and the Airlines. All income from the airport must ultimately be used for airport maintenance or improvement or for a new facility. Thus, failing to assess general aviation for their total costs reduces the benefits which could accrue to the Airlines from the increased revenue.

D. Crash/Fire/Rescue Charges to General Aviation

The landing fees charged to the Airlines increased from 50 cents to 70.21 cents per 1,000 lbs. of aircraft weight in 1988. Approximately 50% of this increase was due to an increase in the costs of crash/fire/rescue ("CFR") services. Provision of these services was extended over the entire 24-hour period as opposed to the 18 hours of service previously provided. The Airlines pay 100% of the CFR costs. General aviation, while receiving these services, is allocated none of the cost. The Airlines contend that these services clearly benefit general aviation,

as well as terminal and parking lot tenants, and that the allocation of the CFR costs should reflect this benefit.⁷

Any airport, in order to receive certification, must maintain CFR facilities if the airport serves air carrier aircraft with more than 30 passenger seats.⁸ 49 U.S.C.A. App. § 1432(a) (West Supp.1991). The defendants assert that since the Airport would not be required to maintain CFR facilities if only general aviation aircraft used the facilities, general aviation should not share the burden of paying for the services. This position fails to account for the fact that CFR facilities are provided and maintained and service general aviation. The CFR facilities answer and service non-airline calls and rescues. These services increase the cost of maintaining and providing CFR services. If the CFR only responded to commercial airline rescue calls, then the 100% allocation would be appropriate. Charging the Airlines for 100% of the cost of CFR services where general aviation and concessionaires, such as car rental companies, receive a substantial benefit is "unreasonable" under the terms of the AHTA. The fact that the CFR services are initially provided because of regulations requiring the services for commercial airlines does not validate allocating the costs of such services only to those airlines when the service provided is adequate to cover all aircraft which use the Airport.

⁷ In fact, one witness testified that most of the CFR runs did not involve air carrier aircraft. Deposition of Robert M. Ross.

⁸ Air carriers aircraft includes only those aircraft which are engaged in

the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce

49 U.S.C.A. App. § 1301(24) (West Supp.1991). See also 14 C.F.R. § 139.3 (defining "air carrier aircraft"); 49 U.S.C.A. App. § 1301(3) (West 1976) (defining "air carrier"); 49 U.S.C.A. App. § 1301(10) (West 1976) (defining "air transportation").

E. Amortization of Carrying Charges

The Airport allocated to the Airlines "carrying charges" or amortization fees for assets acquired. The defendants assumed when calculating the carrying charges that the capital assets were acquired with a nonexistent 25 or 30 year mortgage. Such a mortgage results in interest charges in addition to the historical cost. The Airlines argue that such a charge results in the Airport recovering 2½ times the initial cost. The defendants claim that such a charge provides the Airport a reasonable return on its investment and is similar in scope to the interest charged by a financing institution. The interest rate adopted for the carrying charge is 8% and it is applied to useful life of the assets. This rate is reasonable and should not result in a net present value which exceeds the initial cost of the project.

IV.

The Airlines urge that we find any claims which are not unreasonable under the AHTA unreasonable under the laws of the State of Michigan. Since we have found that the defendants failed to allocate the proper costs to general aviation, we address only the issue of surplus revenue from concessions under Michigan law. Michigan law provides, in regard to the fees charged by the operator of a public airport,

[The] terms, charges, rentals, and fees shall be equal and uniform for the same type of facilities provided, services rendered, or privileges granted with no discrimination between users of the same class of like facilities provided, services rendered, or privileges granted; however, the public shall not be deprived of its rightful, equal and uniform use thereof. Terms, charges, rentals and fees may vary where necessary to provide security and funds for payment of bonds to be issued as authorized for payment of bonds to be improvements to any airport, or to allow for

other differing costs of financing, construction of facilities, or maintenance and operation of the facility.

Mich.Stat.Ann. § 10.233(e) [M.C.L.A. § 259.133(e)] (Callaghan 1981). The Airlines argue that because the fees generated by the concessions generate more than is "necessary" to cover airport costs, they are contrary to state law. The Airlines cite no foundation, either in the language of the statute or in case law, which supports their position. Nothing in the statute suggests that generating revenue through charges to concessions is against Michigan law. Rather, the statute addresses nondiscrimination among similar users and considerations which may be made when setting rates. We find that the Airlines' claims that the Airport's surplus revenue is generated in violation of Michigan law to be without merit.

V.

The Airlines also submit that the Airport's fees violate the Commerce Clause because of the burden they place on interstate travel. The Supreme Court in *Evansville* established three tests to determine whether the Commerce Clause had been violated: whether fees discriminate between interstate and intrastate users, whether they approximate each user's receipt of beneficial services, and whether they are excessive in relation to the Airport's actual costs. 405 U.S. at 707, 92 S.Ct. at 1349. The Airport claims that the status of the factual record does not support this claim and that in any event the Commerce Clause is not legally applicable. We find that the District Court, relying on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), properly dismissed the Commerce Clause contention in its January 19, 1990 decision.

The Supreme Court, in *Merrion*, held that courts should only undertake a Commerce Clause review of a tax or regu-

lation if Congress had taken no other action to regulate the area. Here, Congress has established clear guidelines for the fees and rates that may be charged commercial airlines and other public airport users. As the District Court found, where the issue before the court is the reasonableness of the fees under AHTA, the court should only look at the consistency between the fees and Congressional policy. Thus, the District Court's dismissal of the Airlines' Commerce Clause claim was correct. The Airlines contend that the District Court's decision to dismiss the Commerce Clause claim ignores a recent Eleventh Circuit opinion, *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991). This case however involves a different type of dispute. In *Alamo*, an off-airport rental car company protested the imposition of a user fee of 10% of all gross receipts from the rental of cars to passengers picked up at the airport. The AHTA clearly does not cover off-airport rental car companies. Thus, *Alamo* was not disputing a tax or regulation in an area where Congress had acted and was therefore not barred by *Merrion* from suing under the Commerce Clause.

VI.

According'y, the decision of the District Court is REVERSED and REMANDED in order that the costs associated with CFR services may be properly allocated between the Airlines and general aviation. With regard to the Airlines' claim that the concessions are under-assessed for their associated costs and that the Airlines are entitled to be cross-credited for surplus revenue generated by concession fees, the decision of the District Court is AFFIRMED. The majority of the court also confirms the decision of the District Court with regard to the method used to assess airside operation fees.

CONTIE, Senior Circuit Judge.

I concur in Judge Kennedy's opinion, except for Part III(C), allocation of fair share costs to General Aviation. On this issue, I write for the majority as Judge Nelson and I agree that the method the Airport used to assess airside operation fees for General Aviation and the Airlines was a reasonable method within the meaning of the Act.

In regard to the allocation of other costs, I agree with Judge Kennedy that the allocation of terminal rental costs between the Airlines and the concessions was reasonable, because 100% of these costs was not charged to the Airlines. In regard to crash, fire and rescue charges, I agree with Judge Kennedy that it is unreasonable to allocate 100% of these costs to the Airlines and that a remand to the district court is necessary to determine a proper allocation. Judge Nelson dissents from this position.

I will now deliver the opinion of the court with respect to Part III(C), allocation of fair share costs to General Aviation.

The Airlines argue that the Anti-Head Tax Act, 49 U.S.C. App. § 1513(a), has been violated because the Airport unreasonably charges the Airlines 100% of their airside operations costs for their use of the Airport's runways, taxiways, hangars, and passenger terminal apron, but charges General Aviation (corporate and private aircraft) only 20% of the airside operation costs, which it incurs. The Airlines argue that the Act requires that General Aviation be charged the full amount of its airside operation costs.

I do not agree. Since the shortfall in the costs incurred by General Aviation does not come out of the Airlines' pocket, but is made up instead out of concession revenues, this court has no authority to order that General Aviation must be charged 100% of its airside operation costs. The plain language of § 1513(a) of the Act ap-

plies only to persons traveling in "air commerce." The statute thus does not give the federal courts the authority to dictate how an airport should manage its business in regard to corporate and private aircraft or concessions, but indicates that a court may interfere only in regard to the reasonableness of the rates charged to commercial airlines. It is not unreasonable for the Airport to charge the Airlines 100% of their airside operation costs and General Aviation only 20% of its airside operation costs as long as the Airlines are not required to pay for the 80% "loss" the Airport incurs in regard to General Aviation.

In the present case, General Aviation is charged a four-cent-per-gallon fuel flowage fee and a landing fee which raises less than 20% of the landing area costs created by General Aviation. The shortfall incurred by General Aviation is made up out of the surplus revenues generated by the fees paid by the concessions. The Anti-Head Tax Act is limited in scope to the reasonableness of the rates charged to commercial aircraft operators and does not concern the revenues derived from concessions. Therefore, a federal court does not have the authority to state that instead of using concession revenues to make up the shortfall, General Aviation must be charged 100% of its airside operation costs. A discrepancy in a fee vis-a-vis different types of air carriers based on an operational cost is unrelated to the Anti-Head Tax Act's prohibition against charges on "persons traveling in air commerce." *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 170 (1st Cir.1989). Moreover, even if General Aviation were charged 100% of its airside operation costs, the Airport reasonably could continue to charge the Airlines 100% of their airside operation costs. Thus, the demand which the Airlines make would not necessarily bring them any relief.

To reiterate, the Anti-Head Tax Act authorizes the federal courts to intervene in the setting of airport rates and charges only in the limited circumstance where the

rates charged to commercial airlines are unreasonable. The decision of the Airport in the present case to charge the Airlines 100% of their airside operation costs, but to charge General Aviation only 20% of its airside operation costs, does not result in discriminatory treatment against the Airlines, because the shortfall from General Aviation is not paid for by the Airlines but is made up out of the surplus concession revenues. This Court is in agreement that the Airlines are not entitled to a cross-credit of concession revenues. Therefore, the Airlines do not have standing to challenge what is done with the concession revenues in regard to General Aviation. The Airlines do not contend that the fees charged them for their airside operations costs are arbitrary or capricious and concede that the fees are based on the actual break-even costs calculated on the basis of aircraft weight and number of landings. Because the fees charged to the Airlines for their airside operations have a reasonable relationship to the actual costs incurred, they are reasonable within the meaning of the Anti-Head Tax Act. The decision of the district court that the method the Airport used to assess airside operations fees was a reasonable method is hereby **AFFIRMED**.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part.

I would affirm the judgment of the district court in its entirety. I agree with what Judge Contie has written with respect to the issues addressed in Part III(C) of Judge Kennedy's lead opinion (allocation of fair share costs to concessions and general aviation), but I am not persuaded that the airport acted unreasonably in its treatment of the cost of crash/fire/rescue services. Accordingly, I dissent from Section III(D) of the lead opinion and from the portion of the judgment that orders a remand.

In joining Judge Kennedy's opinion on the allocation of costs between the airlines and other users, I wish to

add a few words on the treatment of the public spaces in the passenger terminal building. Under 49 U.S.C. App. § 1513(b), the airport is allowed to levy and collect "reasonable" rental charges from aircraft operators. The airport has considerable leeway in determining what is reasonable, and even if the record showed that 100 percent of the amortization and operation and maintenance cost of the public spaces in the terminal was being allocated to the airlines, I would be reluctant to conclude that such an allocation was unreasonable.

It would not be unreasonable, I think, to view airline traffic as the *raison d'être* of the terminal. Professor Ferdinand Levy, a highly qualified economist, testified that "you could cut out all the concessions [through the use of satellite parking and so forth] and you could still have the airport and the airlines." (Trial transcript, pp. 993-94). And if the fundamental purpose of the terminal is to serve the airlines and their customers, it would not be unreasonable to assign to the airlines the full break-even cost of the terminal's public spaces.

The same logic informs the district court's discussion of the assignment to the airlines of the cost of crash/fire/rescue ("CFR") services:

"Plaintiffs argue that they should not be charged 100% of CFR expenses. This Court agrees with the *Indianapolis* court that such costs are properly allocable 100% to the airlines. 733 F.2d at 1271. The CFR costs are incurred solely because of the presence of plaintiffs and other commercial airlines at the Airport. If all the concessionaires, general aviation and fixed base operators terminated their tenancies with the Airport, the Airport would still be required to provide CFR. If all the commercial airlines ceased service at the Airport, the Airport would no longer be required to provide CFR. In addition, at trial Dean Nitz, an FAA agent, testified that it was appropriate to charge all CFR costs to the commercial

airlines. Therefore, the Court finds that a charge of 100% of CFR to plaintiffs does not violate the AHTA." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F.Supp. 1112, 1119 (W.D.Mich. 1990).

I agree with this analysis.

The airport's method of allocating CFR costs is not the only acceptable method, to be sure, just as its method of allocating terminal space costs is not the only acceptable method. Economists and cost accountants recognize a wide variety of different methods for assigning costs within a business that offers multiple services to multiple customers. In the absence of a statutory cost allocation formula, however, the courts have no warrant to require the use of one acceptable method in preference to another. *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589, 65 S.Ct. 829, 833, 89 L.Ed. 1206 (1945). Justice Douglas, who spoke for the Court in *Colorado Interstate Gas*, explained that

"where as here several classes of services have a common use of the same property difficulties of separation are obvious. Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Id.* (Citation omitted.)

Cf. National Association of Greeting Card Publishers v. United States Postal Service, 462 U.S. 810, 825, 103 S.Ct. 2717, 2727, 77 L.Ed.2d 195 (1983), a unanimous opinion where the last three sentences of this passage were quoted with obvious approval.

Rate-making, including the cost-allocation component of rate-making, "is essentially a legislative function." *Colorado Interstate Gas*, 324 U.S. at 589, 65 S.Ct. at 833, citing *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1876). Where, as here, a challenged rate structure rests on essentially legislative judgments that meet the applicable statutory test, it is not appropriate for the courts to substitute their judgment for the judgment of the rate-makers.

DEFENDANTS' INTERROGATORY NO. 10

INTERROGATORY NO. 10: State whether any Plaintiff makes any contention in this case that the operation of any aspect of the Kent County International Airport and/or any fees, rates, or charges in issue in this case constitute any type of illegal monopoly or other violation of any applicable state or federal anti-trust law, and, if the answer to this Interrogatory is in the affirmative,

- (a) Describe in detail each and every fact that in any way relates to and/or supports the allegations or contentions set forth in the response to this Interrogatory including, but not limited to the following facts:
 - (i) The persons participating in any and all alleged monopolistic practices, actions, or conduct;
 - (ii) The precise geographic area in which it is claimed that the conduct described in Paragraph (i) above took place;
 - (iii) The precise period of time when it is claimed that the conduct described in Paragraph (i) above took place;
 - (iv) Identify and describe each service of The Kent County Aeronautics Board, and the pricing therefor, that each Plaintiff claims constituted any type of illegal monopolistic practice or other violation of any state or federal anti-trust law; and
 - (v) Specify any alleged [sic] The Kent County Aeronautics Board refusal to contract, negotiate, provide services, or other conduct that any Plaintiff claims constituted any illegal monopolistic practice or violation of any state or federal anti-trust law.
- (b) Specifically identify each and every state and/or federal anti-trust statute, by section or subsection,

that Plaintiff contends was violated by virtue of the facts recited in Paragraph (a) above;

- (c) Identify every person (including every potential expert witness) who has any knowledge of any of the facts set forth in Plaintiffs' response to Paragraph (a) above, and specify which facts are known by each said person so identified;
- (d) Identify each and every document that in any way relates to and/or supports any of the facts set forth in Plaintiffs' response to Paragraph (a) above, and state whether Plaintiffs will voluntarily produce said documents.

[Each of the Plaintiff Airlines responded to this Interrogatory with the following identical answer:]

ANSWER TO INTERROGATORY NO. 10: The Plaintiff does not now contend that there is an illegal monopoly or other violation of the applicable state or federal Anti-Trust Laws because of any activity of any of the Defendants at the Airport. If the Plaintiff discovers any such illegal monopoly during discovery, the Defendants will be so advised. The natural monopoly nature of the Airport does give the opportunity to the Defendants to obtain greater charges from airline passengers for certain services, such as parking, than the Defendants would obtain in the absence of this monopoly.

PLAINTIFFS' PROPOSED FINDING OF FACT NO. 24

24. The cost of producing the passenger flow cannot be directly calculated. However, it is obvious that any appropriate methodology used to divide costs between the users in the terminal building must take such matter into account. If the rentable square footage is divided into the total costs allocated to the terminal, there will be an over-allocation of costs in the terminal building to the Airlines because the Airlines are assigned most of the terminal space, while the concessions receive benefits unrelated to the amount of space they directly occupy.

DEPOSITION TESTIMONY OF JOHN SORENSON

* * * *

[67] Q And United continued to operate at the airport as it had before, did it not?

A United continued to operate at the airport.

Q And so far as you know, did it continue to operate at the airport at a profit, as it had before at Kent County?

A I'm not aware of whether United was operating at a profit or a loss. That really is outside of the scope of our responsibility.

Q Who at United in the chain of people looking at execution of leases makes the judgment that you shouldn't execute a lease because the airport charges will all of a sudden cause the airport to show a loss, rather than a profit?

A The decision as to whether to execute the lease is made [68] ultimately by the person who has to execute it, based on the advice that he may be given from the various organizations involved.

Q I take it that United at any time, if it felt that increased airport charges would cause United all of a sudden to operate at a loss or at a reduced profit from the previous year, could assemble and provide such information to the airport in the negotiation process, could it not?

A Could it choose to give such information to an airport?

Q Yes.

A Well, generally, we do not discuss profitability with outside organizations, and in fact, generally, in our department, we are not aware of whether a particular airport or a particular market segment is profitable or not, and that really is not a decision that we make because we—it's not information we're given because that's not the basis upon which we execute a lease or not.

Q Can I assume that there must be somebody in the chain of command who looks at airport leases who is responsible for making that judgment either at a particular airport or at a group of airports?

A From time to time—well, I don't know. I don't know. United makes decisions to start service and suspend [69] service at airports from time to time. The basis of those decisions, I don't know what the basis is.

* * * *

[124] Q (By Mr. Hunting) Am I correct in assuming, sir, that, generally, United Airlines would approach its flying in and out of any commercial airport, excluding government, Federal government airports, with a view that it hopes to make a profit by virtue of its operations in flying in and out of that airport?

A I would hope so.

* * * *

[148] Q Are you aware of any residual methodology lease that United Airlines has with any airport that does not contain some type of MII clause?

A I can't think of one.

Q Would you tell me what your understanding of an MII clause is?

A Well, MII stands for majority in interest, which is usually defined in each airport agreement in which such a provision exists, which defines, in essence, what majority of an airline community will constitute a recognized majority for the purpose of some kind of a vote, and it can be used in several contexts. Probably the most common is for airline approval or disapproval of proposed capital investments on the part of the airport.

Q And where there is an MII clause in a lease of a residual methodology nature between an airline and an airport, it gives at least some measure of control or veto power to [149] the airlines over what the airport can do by way of spending money; am I correct?

A Yes. The purpose of it is to—in the case where the airlines and airport have negotiated a residual cost agreement, it is the protection to the airlines that the airport will not proceed with what the airlines might believe are unreasonable investments. Veto power, I think, is an overstatement of how, in practice, that works.

Q But an accurate statement as to how it could work in theory, correct?

A It's a mechanism by which the airlines could object and delay or defer or disapprove a proposed capital improvement.

Q Or perhaps prevent?

A It in some cases could prevent.

* * * *

DEPOSITION TESTIMONY OF MARK W. FISHER

* * * *

[7] Q Can I assume that most likely that was a profit motivated decision by somebody?

A I don't know whether it was a profit motivated decision. It was a marketing—more of a marketing related decision than anything else.

Q And apparently Fischer Brothers stayed at the airport until the end of 1986, and then, as I understand it, it was Fischer Brothers that left at the end of 1986?

A It—somewhere in that time frame, that's correct.

Q When Fischer Brothers left in 1986, was there any forfeiture or penalty payment made by Fischer Brothers to the airport?

A No, there was not. To my knowledge, there was not.

Q During the period of time that Fischer Brothers was at the airport in 1986, did it make any investments in the airport, other than perhaps improvements to physical facilities that were being rented?

A We were not renting any facilities from the airport.

Q Were you renting them from Northwest?

A No, we were not.

Q So, your only payments would have been landing fees?

A That's correct.

* * * *

[21] Q Did your business school training involve or include any management cost accounting courses?

A Yes, it did.

Q Do you remember anything about a doctrine of interdependencies in any of those courses?

A I don't recall any, no.

Q Have you ever seen a lease as to which Midway Airlines or any of its subsidiaries or predecessors were a signatory party where the lease contained either reference to the word interdependencies or definition of the word interdependencies?

A There are—there certainly may have been some, but I do not recall. Going through many leases, I'm sure that there's a possibility it was in a lease or two, but I do not recall any.

Q Would you recall what airports those might be, if in fact [22] there was such a reference?

A No, I would not be able to recall that.

Q Have you ever seen a lease for Midway, any of its predecessors or subsidiaries that attempts to define how the doctrine of interdependencies might work as it relates to charges an airport makes to airlines?

A I have seen none.

* * * *

[30] Q Are you familiar with how general aviation charges and fees are handled at other airports where Midway Commuter operates?

A No, I am not.

Q Have you ever heard of any lease where Midway Commuter has been a party that reduced the commercial airline landing fee charges in the event general aviation users didn't pay what was considered to be their allocated share of landing fee costs?

A I do not recall any, no.

* * * *

[36] Q Has your company ever engaged in any study to determine what it incurs by way of expenses to develop

any flow of passengers that occur at any airport where your company operates?

A I am not aware of any.

Q Have you ever seen any such study by any entity, whether it be an airport, an airline, a government, an expert?

A No, I have not.

* * * *

[40] Q And if the airport wished to spend a lot of money against the advice of the airlines, and there was an MII clause, then the airlines would have the right to assert whatever privileges are contained in their MII clause?

A Yes.

Q And those privileges, as I understand them, could include vetoing a project, delaying a project or perhaps insisting that the cost of the project not impact rates that the airlines are charged?

A That's correct.

* * * *

Q Do you get involved in any of the procedures by which the [41] FAA may give tentative or final approval for major airport projects?

A I don't get involved in them. We are made aware of them, but I don't get actively involved.

Q And I take it you at least understand from your experience that one of the reasons you're made aware of such things is so that you can voice opinions on such things?

A Correct.

Q Because many of those kinds of projects, to the extent it's not Federal money or state money, could impact costs and thereby impact charges from an airport to airlines?

A Yes, that's correct.

Q Have you at any time studied any aspect of the future projects under consideration by the Kent-County International Airport at this time?

A No, I have not.

* * * *

[62] Q Do I assume then that the people who make the decision as to the types of planes and the number of planes to bring into an airport have probably already determined that they can make money?

A I don't know if they're determined that they can make money. In our case, with Midway Commuter, our main purpose is to provide passengers to our parent company at the hub, being Chicago Midway Airport. So, the amount of revenue or the cost of doing business at a city like or an airport like Kent County is not necessary—necessarily important or as important as to the number of bodies that we can bring to Chicago and put on our parent company's airplane.

Q But for the larger airlines coming into Grand Rapids, that would be a much more important consideration, would it not?

A I can't answer that. I'm not one of them.

Q Would you expect that it would be?

A I would expect it would, yes.

[63] Q And for your parent company, operating at larger airports, it would be an important consideration?

A Yes, it would.

Q And since the advent of deregulation, if for business reasons or otherwise a company wants to withdraw from an airport, it can do so?

A That's correct.

Q And the companies you have been affiliated with in fact have done that and come back to Kent County International Airport?

A Under two different ownerships, yes.

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DEPOSITION TESTIMONY OF JEROME J. BARNACK

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[16] Q And I take it you realize that the reason that all of us are here today is because the airport and the airlines can't agree on how they would deal with a doctrine of interdependencies, as that doctrine might impact and relate to airport charges to airlines?

A I understood we were here today because the airlines and the county have not been able to agree on the appropriateness of the charges.

Q And—

A Without regard as to any esoteric doctrine.

[17] Q And by esoteric doctrine, you mean the doctrine of interdependencies, sir?

A As you've been referring to it, sir.

* * * *

[35] Q Are you aware of any residual methodology lease of any type, be it a blend or pure, that does not contain an MII clause?

A By MII, are you referring to what's called the majority in interest—

Q Yes.

A —clause? I don't recall of any, but that clause does take on various connotations.

Q And am I correct that among all of the connotations of an MII clause, there is always some feature that provides either a voice or some element of control to the airlines regarding substantial amounts of money that an airport might want to spend?

A Only to the extent that they, they being the airport [36] operator, would be able to charge those costs back to the airlines in the rate base. I'm not aware of any that flat out prohibit—I take that back. I recall one—only one—no, I don't recall any that flat out prohibit the airport from doing certain things that they need to do.

Q And by flat out prohibit, you mean sort of a legal prohibition, as opposed to a practical prohibition?

A Contractual prohibition from the airport operator being able to operate his airport.

Q Correct. Okay. Let's go on.

A There are—the conventional MII has provisions that allow the airport to do what they need to do to remain—keep the airport certifiable, if you would, by the Feds.

Q And certifiable by the Feds includes providing the appropriate amount of crash, fire, rescue personnel and equipment, does it not?

A It may.

Q It does, does it not? Isn't that part of the certification process?

A Depending on levels of service and types of equipment, and all that sort of enters the parameters of it.

Q It certainly applies to the planes your airlines have flown, does it not, in terms of the seating capacity of the planes?

[37] A There are significant amounts of small airports that do not have crash, fire, rescue on the field, and it's not a flat out—to the best of my knowledge, I'm not familiar with certification proceedings, but there are different levels of service that require different levels of crash, fire, rescue.

Q Okay. Let's try to get a few terms correct here. Am I correct that single cash register, as you used the phrase, would be equivalent to pure residual methodology?

A. No. Single cash register, in my terminology, as I used it, means take all the revenues and you take all the expenses, just one bag.

Q Now, with an MII clause, if an airport wishes to undertake a substantial project that the airlines do not want, and for which there may not be complete Federal moneys, then the airport would have to have its own money to go ahead with the project if the airport felt the project was still that important?

A It's difficult to discuss MII provisions without having specific language because they take on so many different aspects.

Q And I take it, sir, that whatever kind of MII clause might exist in a lease, you could expect that it would produce discussions and negotiations between the airlines and the airport as to whether airport projects should go [38] forward or should not go forward as far as the airlines were concerned under an MII clause?

A Certainly.

Q And you've certainly attended meetings, I take it, where the airlines have essentially said, we have an MII clause, and we'd like to have some input on what you're trying to do, and so, you've sat down, and you've had meetings and discussions because the airlines have voiced some concern under the MII clause?

A I have also been at meetings where that we have expressed concern and have had input in projects at airports where MII clauses are not existent.

Q So, it's been both ways?

A Yes.

Q And you have the right to do it both ways?

A As far as I know.

Q And to the extent that you don't have an MII clause, you still have the right to voice concerns in the context of airport board public meetings or in the context of public meetings on Federal projects or in the context of public meetings on master plans?

A As far as I'm aware of, yes.

Q Is it fair to say that there are all kinds of modifications of airport rate making methodologies?

A That's fair.

* * * *

[93] Q Am I correct that you would assume that airlines choosing to commence operation at an airport most likely expect to show a profit at that airport either immediately or within the term of the lease or some foreseeable future period of time?

A I would come to that same assumption, yes. Probably incorrectly, but let's hope so.

* * * *

[97] Q Are you aware, based upon any of your work at any time for any airline, of any study performed by anyone that attempted to isolate or segregate the cost to any airline of producing a flow of passengers at any airport?

[98] A I don't know.

Q I take it you've never seen such, that you can recall today, correct?

A Well, I'm not quite exactly certain what you mean by the study. If you're talking a roll-up or all of the costs of operating at a particular airport, I'm certain that must have been done. I haven't seen such a study. I'm not quite sure what you mean by the question.

Q Okay. What I'm talking about is this: The airlines appear in this case to contend that because they have produced a fellow of passengers in, on and around an airport, they should be entitled to directly or indirectly some amount of the revenue that those passengers generate at the airport by purchasing nonaeronautical products and services. Are you with me so far?

A The quotation marks around entitled and—yeah, go ahead.

Q Now, we can always figure out by looking at what an airline pays an airport in the way of landing fees, terminal rental rates and other charges what these costs to an airline are, correct?

A By doing extensions of those, yes.

Q Or by looking at actual payments?

A Yes.

[99] Q Now, are you aware of any study of any other additional types and amounts of costs that airlines believe they incur other than landing fees, terminal rental rates, overnight aircraft parking fees, in relationship to the production of a flow of passengers at an airport?

A I'm not aware of such a study, but they—I have to gather that surely somebody is doing them. I don't know how else one would determine—I don't know what you'd make—an airline would make to determine whether they remain or walk away from a marketplace.

Q But you've never seen—

A I don't know.

Q You've never seen such a study; am I correct?

A No, I have never seen such a study.

* * * *

DEPOSITION TESTIMONY OF PAUL HEGEDUS

* * * *

[19] Q Well, the methodologies would be embodied in many pages of documents at each airport, would they not?

A It depends on how the lease is written. Some leases contain the specific methodology. Others—others may show the methodology in the way the numbers are distributed on the spread sheet and not specifically have text to go along with it.

Q Have you ever seen a lease of any type that had in it and explained interdependencies methodology?

A None that specifically used that word.

* * * *

DEPOSITION TESTIMONY OF ROBERT M. ROSS

* * * *

[88] Q Now, the revenue bond issue was repaid not by taxes but by revenue from the Airport; isn't that correct?

A It is not paid off yet.

Q It has been paid down, to the extent it's been paid down, however, by revenue from the Airport; is that correct?

A That's right.

Q Now, isn't it true then that the items now being depreciated and upon which a return on investment is being charged include items that were purchased from the original bond issue and also items that were purchased from the Airport operating revenues either through revenue bonds or through expenditure of reserves; is that correct?

A Yes.

Q Has the Airport kept track of the extent to which particular items on which a return on investment and depreciation is being charged were funded from tax obligations or from charges paid by the users of the Airport?

A That could be determined. I don't think we've been doing that specifically, but we could—by checking the books, that determination would be made.

* * * *

[93] Q With respect to the crash fire rescue, isn't it true that the original Buckley studies apportioned that as [94] the cost of the landing area in general were apportioned.

A When the first Buckley—the study was made, we had no expense of that sort.

Q There was no fire department here; is that correct?

A We had a volunteer fire department.

Q How was its cost apportioned?

A It was minimal actually. It was like the local volunteer firemen you'd find in a small area. It was a social group in many ways. They ran the Christmas party; they did everything of that sort. And we paid them—we had the—our own personnel volunteered outright.

The airline people would also volunteer. And when we had an alert, particularly of their own airline, they would go immediately to the maintenance building where we had two pieces of surplus fire fighting equipment, World War II vintage.

Q How were the costs for that operation apportioned in the original Buckley report?

A I don't know. It was just minimal. It really had no effect on our overall operation.

Q At some point did the Board start apportioning all the cost of fire fighting at the Airport to the Airlines?

A Yes, we did.

[95] Q When was that?

A I don't recall. I'm trying to think of when the regulation came into effect. Was it 1971 or '73? That was FAR 139. I believe it was '73.

Q What does the fire equipment consist of at this time at the Airport?

A Well, we are under that regulation. We are under what we call an index C, and we must have a certain amount of vehicles able to carry a certain amount of water and chemical mix. And I think we're up to 3,500 gallons now. And we have the vehicles to take care of that particular requirement. We operate three vehicles.

We've also acquired a nursing truck from the City of Grand Rapids Fire Department, and we've also acquired another tanker which we use for our fire training. We put fuel in it for our live fires that we train our men with.

So basically we have three pieces of equipment that meets the index C requirement of the FAA, which is the gallonage and the chemicals.

Q And those are two pumpers and a nurse truck?

A No, two pumpers, and then we have what we call a quick-response vehicle, because we have to be out on the runway in three, three and a half and four minutes with those three vehicles.

[96] Q So you have a quick-response vehicle and two pumpers. Do you have any other fire or rescue-type vehicles?

A Yeah, we do. We have some—we just bought a new vehicle. The FAA has allowed us to keep one of the old ones which we were going to turn in, and they recommended we keep it, and we have that as well.

Q Do you have any other fire—

A But to meet the index, we have three basic vehicles.

Q Do you have any other fire or medical emergency response vehicles?

A We have a police vehicle, which is equipment with medical equipment, and all of our police are EMTs and all of our firemen are EMTs.

Q Now, what equipment responds to fires in the terminal building or the parking lot?

A Everything we have.

Q What responds to fires in the Amway and Steelcase hangers?

A All of the equipment we have.

Q Am I correct—

A If necessary.

Q Am I correct that Amway and Steelcase have their home-base hangars here in which they store and repair [97] their jet aircraft?

A That's correct.

Q Are there extensive General Aviation hangars here, also?

A Yes.

Q Who responds to fires in the General Aviation hangars?

A Our CFR group. We are supplemented by Cascade Township and we are supplemented under contract with the City of Grand Rapids Fire Department.

Q And the same way, I assume, for fire in the parking lot?

A Yes.

Q You send whatever vehicles are needed from your fire operation; is that correct?

A Yes.

Q In the last year, how many runs did your fire department have that involved air carrier aircraft?

A I'd have to check the records.

Q Do you know if it was more than ten?

A I think it was more than ten, yes.

Q Was it more than, say, 25?

A It probably—that sounds like a figure that would be reasonable.

Q What would your total number of runs, that is, [98] actual dispatching of fire equipment be at the Airport in a year? Would it be 200 or—

A Could be. We can check those figures. We have the records on that.

Q I take it it's fair to say that the vast majority of runs do not involve air carrier aircraft; is that correct?

A You are right.

[120] Q So in other words, there is a percentage allocation which Buckley developed from a formula which your staff applies the same percentage today; is that correct?

A That's correct.

Q Now, do you know what his formula was?

A No, I don't.

Q Have you done anything to test the validity of the percentages currently?

A No, we have no reason to.

Q So you are today assuming that Buckley's original formula was correct, although it apparently died with him, unfortunately, and you are simply applying the result of that formula; is that correct?

[121] A That's right.

* * * *

[221] Q In the rate study which is Exhibit 6, income from wall advertising is deducted from the cost of the terminal before that cost is allocated to the various users; am I correct?

A Yes.

Q Who made the determination to start deducting the wall advertising income?

A Mr. Buckley.

Q When was that?

A In the rate study of—I forget the last time—'67 I believe it was.

Q Did he tell you why he was making that adjustment?

A Yes, it was a concession activity.

Q Other than because it was a concession activity, [222] did he state any other reasons?

A I can't recall.

* * * *

[238] Q Now, let's suppose that some funds are generated from parking lot revenues and then are later used to purchase a capital improvement in the landing area. Can you make that assumption?

A Yes.

Q Is that what your system is designed to do in fact?

A Yes.

Q Now, the item that has been purchased from the [239] parking lot revenue in the landing area, will that then be depreciated and charged out to the users of the landing area, including the airlines?

A Yes, on a break-even return.

* * * *

[240] Q So then isn't it true that if funds from parking lot operations are used to purchase assets in the landing area, in addition to depreciating those assets and charging them to the landing area users, you will also charge a return on investment or interest charge to the landing area users?

A Well, those reserves for capital improvement could go into the landing area or anyplace else, yes. They are really developing new assets, physical assets. And yes, they would be charged an interest rate because, again, we could keep those funds—the county could keep those funds and get a return, interest return on them if we didn't use it for further development of the airfield.

* * * *

DEPOSITION TESTIMONY OF HAROLD PEDERSON

* * * *

[169] Q You were asked a number of questions about federal monies. Is it your understanding that the federal [170] monies were subtracted or backed out of the cost studies in an effort to determine what it was that the airport itself paid for the items that went into the cost areas?

A That's correct, there was credit given for all federal and state aid.

Q And over the years the predominant amount of aid has come from the federal government rather than the state government, as you understand it?

A That's correct.

Q Based upon your understanding of the Buckley formula that you have worked on, if you were to assume

that in a particular year that the revenue from general aviation ended up somewhat below the projected costs for general aviation, is that difference charged to the airline plaintiffs in this case?

A. No, it's not.

* * * *

DEPOSITION TESTIMONY OF SANDRA DONCAL

* * * *

[105] Q. Isn't it true that the carrying charge used in the Buckley method exceeds the depreciation on those items to which the carrying charge applies?

A. Time value of money at depreciation.

Q. Yes, it exceeds the depreciation; doesn't it?

A. Yes.

Q. Isn't it true, then, that there is a charge built into the Buckley system which is greater than the operation and maintenance cost, plus the cost of administration, plus depreciation?

A. It's in time value of money, that's a cost.

Q. You say the time value of money is a cost. By that do you mean that it is a cost to the Department—strike that question. You are saying the time value of money is a cost. Do you mean that the Department incurs a cost equal to the amount it could have received on its investment in the airport had it not invested in the airport and simply put the money in the bank?

A. Yes, except that that is less. That is the floor. Some years, you know, the interest was 21 percent.

Q. Certainly. So in some years they would have had even more money had they invested in—

A. But we didn't use that. We always—the lowest.

Q. So you used the lowest bank rate; is that correct?

[106] A. Yes.

* * * *

[111] In Exhibit 6, is there any attempt made by the Buckley methodology to avoid charging airfield users for airfield improvements paid for by profits or income from non-airfield cost centers?

[112] A. Exhibit 6 is the Buckley study?

Q. Yes.

A. There are no revenues considered in it.

Q. So—

MR. MALLETTE: Well, would you read back the question.

(Reporter read back the requested portions of the record.)

A. There are no revenues considered in this study.

Q. (By Mr. Mallette) Then I take it your answer is, "No"?

A. That's right. There is just cost.

* * * *

[143] [Q.] Directing your attention first to Exhibit 17 of this deposition, and in particular to Page 6 of Exhibit 17, you indicated, I believe, that you participated in most of the collection of data reflected in the middle of Page 6 of Exhibit 17 that relates to different years of total landing fees related to passengers; is that correct?

A. Correct.

Q. And am I correct in suggesting that the purpose of looking at total landing fees in each year related to total passengers served in each year was an attempt to figure out what the actual landing fee charged to the airlines translated into with reference to a landing fee cost per passenger served?

A. Yes.

Q. And between 1983 and 1987 figures shown on Page 6 of Exhibit 17, does that suggest that there has been a significant decline in the actual landing fee charged to the airlines with reference to the passengers served by the same airlines?

MR. MALLETTE: Object, leading.

Q. (By Mr. Hunting) You can answer the question.

A. Yes.

[144] Q. And in 1983, it's indicated that the landing fees charged to the airlines, when translated into the per passenger served by that airline, was 76.37 cents per passenger; is that correct?

A. Yes.

Q. And the same equivalent calculations for 1987 done by you and reflected on Page 6 of Exhibit 17 shows that the landing fees charged to the airlines, when translated to the per passenger served by the airlines, is 59.71 cents per passenger?

A. Yes.

Q. And as I understand it, the adjustments for inflation or the CPI factor were not done by you, but were done apparently by someone else and reflected on Page 6 of Exhibit 17 offered into evidence by Plaintiffs?

A. Yes.

Q. In the CPI figures shown at the bottom of Page 6 of Exhibit 17, although not placed there by you, are you able to confirm that those, in fact, do represent the CPI index figures respectively for January, '83; January, '84; January, '85; January, '86; January, '87; and December of '87?

A. Yes.

Q. And are the CPI figures or components of different CPI figures, statistics and data that you work with in [145] conjunction with your job?

A. Yes.

Q. Since you have been with the airport, has it ever levied any local tax of any sort in an effort to generate revenues for any purpose?

A. No.

Q. And I take it although you were not able to calculate the precise amount currently outstanding or outstanding at the end of December 31, 1987, on the bonds, it is clear that there is remaining indebtedness from both the Series 1 and the Series 2 bonds?

A. Yes.

Q. And since the time that Exhibit 17 was prepared and since the time of the resolution in March of 1988, has there been any announced or accomplished mergers between any of the commercial airlines that have been serving this airport during 1988?

A. Yes, there's one in progress.

Q. And would you just identify which airlines are involved in that particular merger in process?

A. USAir and Piedmont.

Q. Have there been other mergers of airlines that have taken place during the period of time that you have been at the airport?

A. Yes.

* * * *

[158] Q. In your experience, is it typical for a major capital expenditure item in one annual budget to be carried over into another annual budget simply because the project either wasn't finished or because not all payments were made?

A. Yes.

Q. And I take it if you were to attempt to analyze major capital expenditure budgets on a year-to-year basis, you would have to track certain projects that may cover a number of different years?

A. Yes.

Q. If you assumed that for a particular year, and perhaps even a year such as 1987 or perhaps 1988, the total charges to General Aviation by way of fuel flowage and landing fees produce total fees less than the Buckley allocated costs to General Aviation, is that difference or shortfall in any way charged to the airlines under the Buckley method?

A. No.

* * * *

DEPOSITION TESTIMONY OF CHARLES W. SEAMAN

* * *

[49] Q Now, let's take that for a minute. If you have a pure residual methodology at an airport, and if GA doesn't pay its fair share, whatever that may be felt to be, then the commercial airlines are picking up the difference, are they not?

A Under residual cost, the airlines pick up the difference, no matter where it was generated.

Q In particular, if it's generated to some extent in general aviation, under a residual methodology, it directly impacts the financial pocketbook of the [50] airlines, does it not?

A To the extent that there could be a revenue producer on the airport, the answer is yes.

Q Or to the extent that they produce revenues at the airport, but less than what the airlines believe they should produce at that airport, under a residual methodology, it's the airlines that are financially impacted by any shortfall; am I correct?

A Under pure residual, that's correct.

* * *

[60] (By Mr. Hunting) Are you aware of any lease of United Airlines anywhere in the United States with an airport where the word or doctrine "interdependencies" is defined in the body of the lease or agreement?

A No, I can't remember that word being featured in any agreement.

Q Whether it was featured or not, do you know of any particular lease anywhere in the United States where United operates where the word interdependencies is even used, whether it's featured or defined or not?

A Not that I can recall.

Q Have you personally engaged in any study in any effort to apply the doctrine of interdependencies to the facts of this airport or this community?

MR. MALLETTE: I'll object. There's no testimony as to the doctrine of interdependencies or no definition.

You can answer, if you can.

[61] A I have not seen or participated or conducted any study.

Q (By Mr. Hunting) Have you conducted or seen any study that in any way attempts to deal with tracking the costs of producing a flow of passengers at any airport in the United States?

A I can't say no. I'll just tell you I can't recall any.

Q I take it in particular, you don't recall any such thing as it might relate to this airport; am I correct?

A That's correct.

* * *

[69] Q Are you aware of any instance where United Airlines approached a decision to come into an airport to initiate service in the hope that United could share some of the concession revenues of that airport?

A I need to have you restate that one.

Q I'm going to have her repeat it, and then, if I have to, I'll restate it.

(Whereupon, the question was read back by the court reporter.)

A No.

Q (By Mr. Hunting) Are you personally aware of any situation where United decided to either come into an airport, leave an airport or change the frequency of its operations at an airport because of any considerations that related to the flow of passengers at that airport?

A No.

Q Have you ever, as best you can recall, at any time that you personally participated in negotiations with airports or supervised people at United who did that, indicated that someone should look at comparable rates for purposes of those discussions?

[70] A - No.

* * *

[84] Q In particular, directing your attention to Interrogatory # 10, do you personally have any knowledge

of any facts that relate in any way to any claim of illegal monopoly in this case as it relates to this airport?

A No.

Q Personally, do you today have knowledge of any facts that in any way relate to any aspect of any interstate commerce clause violation issue that might exist in this case?

A No.

* * * *

[87] Q (By Mr. Hunting) Have you at any time in any United Airlines lease at any of the hundred nineteen or hundred twenty airports in the United States between 1985 and the present seen any paragraph or clause that refers to the "cost of providing passengers at an airport" in a way that would apply that cost to rate making procedures?

A No.

Q So far as you know, are general aviation users at most airports in the United States charged some type of fuel [88] flowage fee?

A That's one of the methods, yes.

Q Do you happen to know what the range of that might be, in terms of cents per gallon for the last number of years?

A No, I have not been in touch with that.

Q Do other airports in the United States, if you know, also have separate charges to general aviation for tie down privileges, rent for hangars and so forth?

A Yes.

Q And as I understand your testimony, you have no opinion today on behalf of United Airlines as to how this airport should or should not handle its general aviation users; am I correct?

A That's correct.

Q Have you ever performed any study of airports with reference to comparing the net operating income of the

airport either to revenues or to the value of the airport or the local historic cost of the airport facilities?

A No.

* * * *

[97] Q What if the surplus is created by payments made by the public for parking and for use of a motel and for stamps and insurance and restaurant? If you haven't studied the charges that the public pays for that, how does that have some relationship to what the airlines use and pay for?

A Well, you brought up the word interdependence. All those facilities that are part of the total airport complex are interdependent. I mean, the parking garage depends upon the roadway system, and the roadway system delivers people to the terminal building, and the people that arrive at the terminal building arrive by the roadway, or they park their car in the garage. They're all interdependent and if the costs are interdependent, so are the revenues.

Q If the parties can't agree on how to quantify this interdependency, who then would do it for the parties?

MR. MALLETTE: I'll object to that. That's a legal conclusion. In fact, the district court is going to do it. He can answer, if he knows.

A Well, I can't say how it's going to come out in Grand [98] Rapids, but—

Q (By Mr. Hunting) You—excuse me.

A But if you have—you know, that's a normal type of debate as to how you allocate cost and revenues from one cost center to another, recognizing the concept of interdependence. Just as there are dozens of kinds of lease agreements, there's probably dozens of different ways to allocate costs. So, if a debate is in process, either party may want to call in some help to participate in the debate and reach some sort of a conclusion. Conclusion means the agreement's been signed, and life goes on. If there's no conclusion and the debate rages on, then the agreement's usually expired, and they're not renewed.

Q Now, as I understand it, you've made no specific study of interdependency, true?

A No specific study, no.

* * * *

[108] Q I take it you have no personal knowledge of any of the expenditures of the Kent County Road Commission on any of the public roads that bring people to and from the airport; am I correct?

A That's correct.

Q I assume that obviously, all airports in every year will have some projects for refurbishing, expanding or changing some aspect of an airport?

A It's very common.

Q Have you studied any of the agreements or contracts between the airport and any of the entities that provide nonaeronautical services or products at this airport?

A No.

Q Based on anything you know, are there any non-aeronautical products or services currently provided at this airport that, in your opinion, should not be provided at all to the public or passengers who come here?

[109] A It wouldn't exist if it didn't have a demand, and if it has a demand, it belongs here.

* * * *

[119] Q I have only one question. You worked for Hertz, correct?

A That's correct.

Q When the rental car companies pay an airport ten percent of their revenue, is that payment for the square footage they occupy in the terminal or for access to the flow of airline passengers?

A It's for access to the flow of passengers.

* * * *

TRIAL TESTIMONY OF RICHARD K. DOMPKE

* * * *

[124] Q On January 1, 1987, what was the total cash and cash equivalent such as money market fund investments of the airport, including both regular accounts and so-called restricted accounts?

A Approximately six-and-a-half million dollars.

Q And what is that figure now? Well, what is that figure as of December 31, 1989?

A Just slightly over nine million.

Q I call to your attention Plaintiffs' Exhibit 1 and 2, and on Plaintiffs' Exhibit 1, which is year end of December 31, 1985, I'll ask you to turn to Page 3 and tell us when that was issued by the accountants.

A February 28, 1986.

Q And would you look at Page 5. What was the net income for the Board for the year ended December 31, 1985?

A The reported net income was \$1,914,332.

Q Exhibit 2 is for the years ended December 31, 1986, and 1985; is that correct?

A That's correct.

Q And I'll ask you to look at Page 5 of Exhibit 2. There are two columns. One's for '86 and the other '85.

[125] A Yes.

Q And I'll ask you to look at the bottom of Page 5 of Exhibit 2. What is the net income there reported for 1985?

A Well, at this point in time it is now reported as \$2,378,502 for the same year.

Q Between the 1985 financial statement that was issued early in 1986 and the 1986/1985 financial statement which was issued early in 1987, it appears that the 1985 net income has changed from \$2,378,000 to \$1,914,000; is that correct?

A That's correct.

Q How can the net income be different on two different financial statements of the authority for the same

year? Can you tell that from looking at the financial statement?

A Yes. There is a new line item there under non-operating revenues titled "Interest Revenue on Restricted Assets" for 1985. That's \$464,170, and I do believe if you either subtract that from the number reported here on Bates number 217 or add it to the number reported on Bates number 195, you will see that that's the difference between those two numbers.

Q Suppose, as has been stipulated, that the airlines between August 1—now, look at 1984 on Exhibit No. 1. The net income is \$1,438,000; correct?

A Yes.

* * * *

[140] Q Are there costs involved or any integration of the airport or anything of that nature involved in producing customers for that parking lot?

A Certainly. Every customer in the parking lot passes through the roadways leading into the airport, and he also passes through the terminal and through the airfield. And his share, his proportionate share of the costs of getting to and from that parking lot should be associated with him. That parking lot wouldn't exist if it were dissociated from the roadways and the landing field.

Q Calling your attention to the rate study, am I correct that a correction was issued to the rate study soon after it came out with respect to the square foot rental on Page 2?

A Yes. I understand that a letter was produced by the airport, sent to the airlines correcting the rate per square foot from the amount shown in the rate study to the ordinance amount.

MR. HUNTING: So the record is clear, that was done prior to the time the ordinance was adopted. The airport had the courtesy of sending a draft of this report to the airlines before the ordinance was filed. That correction was made before the ordinance was filed.

MR. MALLETTE: Fine, and we would certainly accept that and so stipulate.

[141] BY MR. MALLETTE:

Q Then where we have this \$25.32 and \$12.66, we should put in the ordinance rates; is that correct?

A Yes. You want those?

Q Yes. What are they?

A \$24.67 for the enclosed air-conditioned, commonly referred to as prime; and \$12.34 for the enclosed air-conditioned, heated unfinished, commonly referred to as non-prime.

Q In November and December of 1989 did the airport issue another alleged correction to the rate study, this time dealing with landing fees?

A Yes, they did.

Q And does the information that they provided to us give you sufficient information to verify the accuracy of that one way or the other?

A No, it did not.

Q In this rate-making methodology they have cost centers, they allocate costs to the cost centers. Are there any costs that you believe are not real or should not be involved in their rate-making methodology?

A Yes. Definitely the carrying charge.

Q And how is this carrying charge computed?

MR. HUNTING: I'm going to object, Your Honor. Again, I don't believe this Witness has testified that he has any familiarity with the extent to which a carrying charge is [142] adopted by other airports in similar circumstances.

MR. MALLETTE: Well, I believe he can testify how this carrying charge compares to the depreciation on their assets and how it compares to the amount necessary to pay their bonds. Now, if there is any rationale for a charge being made with respect to the airport's fixed assets, it is our contention it ought to be on the basis that, one, we're depreciating the assets and we're paying

depreciation; or two, we've got bonds out and the users have to pay the principal and interest. We intend to show by this line of questioning that the carrying charge greatly exceeds the depreciation on the items, and it also greatly exceeds the debt service on the items.

THE COURT: Well, I'm trying to follow here. I think—did you jump to Page 6 of that report? Is that where we are?

MR. MALLETTE: Oh, I'm referring to Exhibit 6.

THE COURT: I'm aware of that. But are you on Page 6? Where are you?

THE WITNESS: May I help you?

BY MR. MALLETTE:

Q Yes. Could you tell me where you will find the carrying charge?

A You won't find the carrying charge in this study as such, a number. You have to ferret it out again.

[143] Q Would you ferret the carrying charge out from Exhibit 6?

A Yes.

THE COURT: I think it might be handy for all of us if we knew what the carrying charges as defined were, because I sense that each of us has our own rough definition unless defined, I think, before I can deal with that. I presume that question has been withdrawn, but let's get back to some more fundamentals here.

THE WITNESS: I—

THE COURT: Excuse me. You ask the question.

MR. MALLETTE: Yes.

THE COURT: The ball's in your court.

BY MR. MALLETTE:

Q I will ask it. Would you explain how the—is the carrying charge defined in Exhibit 6 as such? Is there a definition that I could turn to and find?

A There probably is in the text, but I find the best way to define the carrying charge is to look at an exhibit

and see how it is computed and then look at another exhibit and see how it totals to the total number.

Q Fine. Would you tell us which exhibit shows how it's computed?

A Well, the first one we would come to would be—I think it's best to refer to the Bates number. I believe it's 000988. Yes, 000988. It's titled "Average Annual Charge [144] Attributable to Depreciable General Purpose Investment."

Q I see that. Go ahead.

A I believe it's Exhibit 5 within Exhibit 6, page—I'm sorry.

Q Page 1 and 2 of that Exhibit 5; is that correct?

A Right, Page 1 and 2.

Q Okay. Go ahead.

A Well, the methodology followed here is to take the original cost of the investment and subtract from that federal aid and state aid and come up with a number referred to as "Net for Rate Base," Column 5. And then they have a column there called "Useful Life" in months which Mr. Buckley defined as economic useful life, and I believe that's different than the accounting depreciation life. The next—actually, the next three columns are the computation of monthly carrying charges. The title there, "Monthly Carrying Charges," applies to interest and amortization, and that's at eight percent. Then the next column is "Periodic Maintenance," which works out to be half a percent, and then there's a column called "Total Dollars."

Now, the column "Total Dollars," 9, they don't indicate this, but I'll help you, is Column 5 times the summation of Columns 7 plus 8, and that's how they compute the dollar amount in Column 9. Then the next column shows the use beginning—I'm sorry, that's "Use Begun or Begins On." They [145] show the date of initial application of the carrying charge. Then the "Months in Use," and Column 12 again is the computation of that. Column 9 times Column 11 gives you the monthly—I'm

sorry, that's for the entire three years, because they show the months in use there. I can't read it, but I think it's 36. So it would be for the entire three-year period of the rate study is going to be that column. So the heading up there says "3 Years Beginning 1-1-84." It should obviously be 1-1-87. It just wasn't changed for the updated study.

* * * *

[146] Q Now we're at the average annual, and that's \$22,000, and I take it they sum up everything in the rate study and you arrive at a total someplace; correct?

A Yes. You sum these carrying charges for these various asset categories and carry them forward and back to Bates number 000985, and it's not titled as such, but the first three columns there represent the carrying charges from the subsequent exhibits, one of which we went through, the column headings, anyway. But the columns indicated here as 2, 3, and 4 are carrying charges. You can see the totals at the bottom of those columns, you add those totals, they come to \$2,217,502 per year of carrying charges.

Q Now, the carrying charge, that is a basis upon which the rate study charges for the fixed capital assets; is that correct?

A Yes. It's their way of—I would define it as capital cost recovery.

Q And how does that capital cost recovery compare with using depreciation or using the bond principal and interest payments [147] with respect to any debt that remains on those assets?

A Considerably higher.

Q I hand you Exhibit 327 and ask you what that is.

A That's a comparison of capital cost recovery approaches taking the rate study approach that we just went through and comparing it to an income approach or a coverage approach.

Q Now, do businesses and other enterprises in the United States look at recovering or considering as a cost their fixed assets as they depreciate?

A Yes, but on a depreciation basis. The normal business approach is to take depreciation as a cost item, expense item.

Q And I note that you have added to that debt service interest in an income approach; is that correct?

A Yes.

Q And then your coverage approach, you would be looking for, what, debt service on the debt outstanding on the fixed assets plus some coverage; is that correct?

A Plus the normal coverage.

Q And you're talking about what, 40 percent of the debt service?

A For this illustration I computed a 1.4 debt coverage ratio.

Q Am I correct, then, that they are charging far more, as shown by Exhibit 327, in the rate study for their fixed assets than they could charge if they simply charged depreciation? [148] Is that correct?

A Yes.

Q Does that have a serious impact on the rates produced by the rate study?

A Oh, quite definitely. Almost an additional million dollars in terms of comparing it to the income approach; a million three compared to the coverage approach.

Q And then that gets broken out among all the users, and part of it, of course, goes to the airlines and part to the other users; is that correct?

A That's correct.

Q Can you determine a reasonable rate for this airport by just taking out the carrying charge and computing everything on depreciation or debt service?

A Not completely.

Q Why not?

A Because this is only one factor involved in the rate study. There are other factors that are also a problem.

* * * *

[155] Q Based on your total, without going over every line item, based on your total review of the rate study, which is Exhibit 6, and based on your review of any corrections you have seen to that issued at any time, what are your conclusions as to the allocation of costs to the various revenue-producing cost centers?

A I think they were done in many cases on an arbitrary basis, certainly illogical in many cases, and I think in sum total unreasonably.

Q How about the allocation of costs to users in the terminal building? Does the rate study allocate costs to users in the terminal?

A Yes, it does.

Q And on what basis does it do that?

A Well, that's covered here. Shall we go to the particular pages that that applies to?

Q Fine, or you can just tell us how they do it, either way.

A Okay. Well, they come up with, again, a so-called break-even cost, which again includes carrying charges on the assets involved in the terminal building, and then to that they add their real costs of operating and maintenance expenses, and then they divide that by space which they characterize as rentable square footage to come up with a space rental rate.

[156] Q And is that the basis on which they allocate the cost of the terminal between the concessions and the airlines?

A Yes.

Q Approximately how does the space rented in the terminal building stack up between the space actually—well, the space assigned to the airlines and the space assigned to the concessions?

A My computation, it's 76 percent of the space, rentable space is charged to the airlines.

Q So on that basis most of the costs of the terminal are charged to the airlines; is that correct?

A Definitely.

Q Now, when you look at the rental car companies, am I correct that the rental car companies have small booths near the passenger baggage claim?

A Yes, they have their counters there.

Q When you compute the square footage and multiply it by the prime rate, can you tell what costs the rate study allocates to rental car companies?

A Yes.

Q And what costs are they?

A Well, in the terminal building, just for their counter space, about \$28,000.

Q How much income do the rental car companies pay to the airlines pursuant to the agreement that lets them operate [157] their booths in the terminal building?

A I believe you mean to the airport.

Q I'm sorry, to the airport.

A Over \$650,000 per year.

Q So the rate study, Exhibit 6, allocates \$28,000 in costs to the rental car companies, yet the income is \$650,000; is that correct? That is to the airport?

A That's correct, to the airport.

Q Does that indicate anything to you about the validity of their cost assignment; and if so, tell us why?

A Well, it indicates to me that their cost assignment is ignoring a significant portion of the costs that should be properly allocated to the rental car concessions.

Q What do the rental car concessions pay for pursuant to their agreements? Well, first of all, on what basis do they pay? Do they pay so much per square foot or do they pay based on a percentage of the business they do?

A They're paying ten percent of their revenue that they generate at that airport.

Q And is that paid for that small amount of square footage, or is it paid for their access to the flow of airline passengers?

* * * *

[158] Q Do you have an opinion as to whether the rental car company is paying for the access to the passenger flow or for that square footage? I'm just asking do you have an opinion?

A Yes.

* * * *

Q What's the basis for your opinion?

A Based on all of my years of experience with cost accounting systems, cost allocation systems, cost estimating, [159] other aspects of businesses, I have never run into situations with that sort of relationship between so-called costs and the revenue-generating capability of those costs.

Q Have you looked at the leases of the rental car companies?

A Yes.

Q Can you tell us whether or not they have an escape arrangement so if the airport gets closed they don't have to stay there; that is, if it can't operate as an airport?

A Yes, they do.

Q Based on their leases and your examination of their leases, and based on your general knowledge of business and industry, are they paying for access to the passenger flow or are they paying for the small square footage that they rent?

A It's obvious to me they're paying for the access to the passengers.

Q Is there advertising revenue in the terminal?

A There is an item identified as advertising media revenue, yes.

Q And how does the rate study, Exhibit 6, or any corrected rate study you have seen deal with that?

A It is subtracted—at least \$50,000 of advertising media revenue is subtracted from the costs that are needed per the Buckley methodology to determine the break-even costs from the terminal building.

Q Is any other concession revenue treated in that manner?

[160] A No.

Q Is that stated to be, what, wall advertising?

A Yes.

Q What is the total amount paid to the airport for advertising in the terminal building per year?

A The contract with the advertising company indicates that over this three-year period of this rate study, it averaged—I believe it was about \$170,000 per year. It was a stepped basis, going up each year.

Q And is there any cost allocated to the advertising user, the company that has that contract, in the rate study? Does it allocate any of the costs of the terminal to them other than the \$50,000 deduction?

A No. There is no area designated in the rate study or in the floor plan map of the terminal building designated for advertising media.

Q Are there any other users of the terminal that have no costs assigned to them by the Buckley methodology—by Exhibit 6, I should say?

A A considerable number.

Q And who are they?

A Well, you have the food and concession areas that are located in the concourse. You have vending machines; you have the baggage carts, baggage cart racks, that is; you have all the telephones throughout the terminal; baggage lockers. [161] Well, then in the baggage claim area there are a number of things such as the direct lines to the hotels and motels with a display board. I can't think of any others.

* * * *

[163] Q I call your attention to sheet A3 of Exhibit 23 and ask you if you note that there is Concourse A shown, and there is a large pink area in the concourse which is a large corridor marked "Concourse" running along the concourse. Do you see that?

A Yes, I do.

Q Is that pink area treated as public area in Exhibit 6?

A It's designated as a public area, yes.

Q And as public area, it would be charged primarily to the airlines; is that correct?

A Yes. The way the relative square footage, rental square [164] footage works out, 76 percent of the cost of that area would be going to the airlines.

Q Are there any users, other than airline passengers who may be walking through the concourse, are there any users in that concourse currently during the period you have known the airport?

A Yes.

Q And what are they?

A Well, they have food and beverage carts with roped off areas with tables where you can have yourself a little snack while you're waiting for your flight. Then again, the walls are loaded with display advertising. They have again the baggage cart, the baggage lockers, telephones, vending machines spread out up and down the concourse.

Q And is there any point in that concourse at which you don't have a concession offering to sell you some type of goods or services or advertising somebody else's goods or services?

A Well, I didn't notice any in the men's room.

Q And how about the other concourse? Is that the same situation? By that I mean Concourse B shown on the plans.

A Yes. I toured the entire terminal building, every room, except the women's room.

* * * *

[165] Q And in the parking lot, how much in costs are allocated to the parking lot by the rate study, which is Exhibit 6?

A As I recall—well, you won't find—I'm sorry. I believe you can find—I think I better lead you to it because I don't want to misspeak here.

On page number 000985, again you'll see a line there. Well, you go down the revenue producing area list and there's one that's a subcategory there or category there called Public Auto Parking, and there's a sub under that, A. Passenger Terminal. And if you follow that all the way over to the Grand Total column, they're allocating \$687,550 to the [166] passenger terminal parking lot.

Q What's the revenue from the passenger terminal parking lot?

A Well, almost a million dollars a year more than that.

Q So the revenue is a million dollars greater than the cost; or, put another way, the revenue is nearly, what, three times the cost?

A No, I wouldn't put it that high. Well, we're dealing with a total revenue here, let's say, of about one million seven, so \$687,000 off of that then leaves you with a million dollars of net income or profit from the public auto parking lot.

Q Does that fluctuate slightly from year to year?

A Oh, yes, yes. I don't—in terms of the revenue, it fluctuates more than slightly. I think it's rather dramatically. It's been increasing.

Q And does the parking lot in the regular computations, in the regular bookkeeping of the airport, is the parking lot considered as a revenue center by itself or is it thrown in with another revenue center? How do they handle it on the financial statements?

A On the financial statements it's combined with the passenger terminal building.

Q What is your opinion of the cost allocation with respect to the parking lot of the rate study? Do you believe it's correct or incorrect?

[167] A Oh, I believe it's incorrect.

Q And why is it incorrect?

A Well, again, it's evident to me that they're under-allocating costs to the parking lot, other airport costs.

Q Is the parking lot dependent in any way on the airfield and the terminal for its operation?

A In my opinion, to a considerable degree. Completely.

Q And what's your opinion of the cost allocation between the airlines and the users, other users in the terminal building? Do you believe that's correct or incorrect?

A Well, I believe it's incorrect.

Q And why do you believe it's incorrect?

A Well, as I am hopefully demonstrating here, there's considerable space in the terminal building that is designated as public space which is in fact concession space because they're deriving the revenue from that space, and then also at the same time the baggage claim space, in my opinion, is concession space. They're the ones that are deriving revenue in the baggage area.

Q Being specific in talking about the rental car, do you believe the allocation of \$28,000 to the rental car company is valid in face of the 600-plus thousand dollars income from them?

A No.

Q Now, are there any errors in the rate study that don't [168] involve the methodology or its application or cost allocations, but just involve mechanical things like misadding or something of that nature?

A Yes. There were some that were pointed out to us during depositions of the airport staff, and there were others which I noted while I was sample-checking various allocations.

Q Let me ask you simply, are they correct on their carrying charge where they determined how many months of life are involved during this period with respect to items?

A Well, I checked one table here. I didn't go through the others, but the first table, it's likely the first one and—

MR. HUNTING: Can we have the page, sir?

THE WITNESS: I'm sorry. 000988. I'm back to that one. And what I did was take a look at the number of months in use column there and compare that to the useful life versus when useful life began date and noted that six of the 24 items actually ran out of life during the rate study, whereas the annual charge was computed for the entire three-year period.

BY MR. MALLETTE:

Q During your attention to Exhibit 6 and its applications out in the landing area, am I correct that crash/fire/rescue, the operation cost of crash/fire/rescue is simply allocated directly to the airlines?

A I would say it's charged directly to the airlines in this study, 100 percent.

* * * *

[172] Q I call your attention to the allocation to general aviation, Exhibit 6 at Page 4, and ask you how much is allocated to general aviation?

A \$650,000.

[173] Q And did the Board use Exhibit 6 to determine charges to general aviation?

A No.

Q What is the charge to locally based general aviation of the Board to pay for locally based general aviation's use of the landing area; that is, the runways and taxiways?

A They are billed based on a fuel flowage chart of four cents per gallon.

Q And how much does the 1988 budget show that that fuel flowage fee is designed to bring in?

A \$100,000.

Q And how does that compare with the \$650,000 in costs that the Board's Rate Study says they should bear?

A Obviously, it's \$550,000 below the costs.

Q And do you know what historically over the years the landing fee charged to itinerant, that is, non-locally based general aviation brings in?

A Well, they pay the landing fee, at least, the itinerant would pay, and that dollar amount—

* * * *

[175] Q And the non-commercial, non-passenger airplanes, that is, the corporate planes and private planes that are based here are charged four cents per gallon fuel flowage fee which is designed to raise \$100,000 a year; is that correct?

A Yes.

Q Over the three-year period, what was the airport's experience in the amounts actually raised from that fee?

A Well, it was slightly less than that, I believe. As I recall, somewhere around in the \$80,000, \$86,000 range.

Q And how about the fee on itinerant general aviation; that is, planes that are non-air carrier but just fly in from some other airport? Historically, about how much is raised from them in the way of landing fees?

A Fourteen, fifteen thousand dollars a year.

Q With respect to locally based general aviation, how long has the four cents a gallon fuel flowage fee remained at the same rate?

A Since 1963.

Q And since 1963 what is the approximate percentage increase that the fees for use of the landing area assessed to the airlines has increased?

A About 300 percent.

* * * *

[177] Q If you'll turn to Page 4 of Exhibit 6, the rate study, and I'll ask you what the break-even costs of the passenger and terminal apron are.

A \$222,877.

Q To what users are the costs of the passenger terminal apron assigned by the rate study?

A Well, it's 100 percent to the scheduled airlines and becomes part of their landing fee.

Q And is that Column 3 on Page 4 of Exhibit 6?

A That's correct.

Q Are the airlines paying for their gates in the terminal?

A Yes.

Q Am I correct, then, that the airlines are being charged a parking fee for parking at the passenger terminal that has already been charged them through the landing fee, and that they are paying, then, something like four times the costs that the rate study says should be recovered by that parking fee?

A Yes.

Q In the past, historically, has the airport had sufficient funds to pay its bonds, principal and interest, including the bonds that were actually paid from a tax levy back in the '60s?

A Yes.

* * * *

[190] Q If there is an asset of the airport which is a capital asset, how does the Buckley methodology charge the cost, the [191] capital cost of that asset out to the users of the airport?

A Through the carrying charge vehicle.

Q And how much of the actual cost is recovered by the carrying charge?

A Well, in terms of the local share, the contribution from local—alleged local sources, it charges that based on the carrying charge, which ends up, in effect, being doubled, approximately, of what it would have been if they had just used appreciation for those assets, for that same value of assets.

* * * *

[193] Q Certainly. Suppose that the Board over a period of years collects money from the users at the airport, puts it in its [194] common pot, and then takes out the money and buys a capital asset. Am I correct that the users through their prior user charges have paid in to the Board the amount of that capital asset?

A Definitely.

Q What happens, then, when the capital asset is placed in service?

A Then the Board starts charging a carrying charge on that capital asset.

Q And under the rate study methodology do they charge that out and prorate it out on their cost accounting—well, on their cost allocation basis, whatever it is, to the various users?

A Yes, they do.

Q And if there is prefunding and then the carrying charge of the rate study is applied, how many times will the users pay for that improvement?

A At least twice, and if you want to view it from the standpoint of the local funding aspect, it probably is about three times.

Q I understand that we are not—were you in your answer not including the federal funds component?

A That's right.

* * * *

[321] Q Okay. Now, did you take this net income, treat it in this way and compare it to any other airport in the United States?

A No.

Q What about positive cash flow and the way in which you derived that? Did you take that and compare it to any airport in the United States?

A No.

* * * *

Q Did you make any effort to contact any airport property manager or airport agent who has actually testified in this case to check with them regarding any aspects of the rate proposals you have calculated?

[322] A No.

Q I take it you knew from reading the general principles of Buckley that he clearly set forth in those general

principles the proposition that the non-aeronautical or the concession revenues of the airport would, under his methodology, continue to belong to the airport?

A That's what he said.

Q There was no question about that in terms of his intent; am I correct?

A I agree.

Q And you wouldn't have to be a cost accountant to read it and to know that; am I correct?

A You're correct.

Q So even though the airlines may have disagreed for a long time about that particular proposition, would you agree with me that Buckley had very clearly set it forth in his general principles?

A Yes.

Q And those general principles are referred to by reference in the very first sentence of the rate-making study, which is Exhibit 6; am I correct?

A I don't recall which sentence it appeared in.

Q But they were referred to?

A Yes.

Q And did you assume when you first became involved in this [323] case that the airlines knew what those general principles were?

A I assumed they did, yes.

Q And at least the general principles that the airport would retain concession or non-aeronautical revenues had been a very consistent experience throughout the entire Buckley methodology, had it not?

A Yes.

* * * *

[329] Q Grand Rapids is not a hub airport; am I correct?

A Well, the AAAE Survey classifies it as a small hub. I don't understand why, since no one refers to it as a hub.

Q So we can agree that it's really not a hub?

A We'll agree.

Q And can we agree that that means that most of the people are origin and destination people as it relates to the community?

A That's what that means, yes.

Q Most people flying out of Grand Rapids are taking a round trip to come back to Grand Rapids?

A Yes.

Q So if those are the kind of people that are spending the money on the concession activities, they're the ones at least putting in that share of the concession revenue that may ultimately be part of the net income; am I correct?

A It will be a part of the net income, that's true.

Q And that's not the only way in which citizens contribute to an airport financially, is it? There could be taxes?

A Well, yes, there could be.

Q And they pay an eight percent tax when they buy a ticket, [330] do they not?

A Yes.

Q And that money goes to a federal fund, does it not?

A Yes.

Q And then that federal fund, in manners determined by the FAA, parcels out money to airports for projects and expansion purposes?

A And I presume that Grand Rapids gets its fair share.

Q My point is that the eight percent tax paid by the local citizen generates money that comes back into the airport; correct?

A Yes.

Q Obviously, you may not be able to trace the dollars, but the general principle is if you're paying the ticket, it's going to go into some airport somewhere through the FAA for some approved project?

A That's correct.

Q So in that sense citizens of communities are either supporting their own airports or they're supporting other airports, and people in other communities are helping us support our airport?

A Unfortunately, that's the truth of the situation, I would say.

* * * *

[334] Q Mr. Dompke, I'd like to pick up, if I can, where my best recollection is that I left off, and that was dealing with the proposals that you were sponsoring with reference to rates, those that were taken from deposition Exhibit XX and carrying a number of exhibit numbers in the 300s. Do you have those in front of you, sir?

A I believe so. I have some of them, perhaps not all.

Q Okay. What I'd like to do first, if I can, is to approach those proposals from a general point of view, and if I'm correct in recalling your deposition testimony, all of the proposals are in one form or another a residual methodology; [335] am I correct?

A I would say yes.

* * * *

Q Are we sort of homogenizing users, then?

A Homogenizing?

[336] Q Standardizing?

A We're treating all users equally.

Q Non-aeronautical as well as aeronautical?

A Yes.

Q So that would be a substantial departure from the historic Buckley approach, would it not?

A Oh, yes.

* * * *

[381] Q Are you aware of the fact that the totality of the landing fees, overnight aircraft parking fees, and terminal rental rates paid by the airlines in this case to this airport constitutes less than two percent of the airline revenues produced on a per-passenger basis?

A Produced where?

Q In Grand Rapids.

A I'm not specifically aware of that, no.

Q Did the relationship between the totality of the airline landing fees, overnight parking fees, and terminal rental rates, when compared to the revenues generated by the airlines by virtue of ticket sales, enter into any of your considerations with reference to any of your proposals?

A No.

Q Did the ability of airlines to make or not make a profit at either the old rates or the new rates enter into your [382] proposals to any extent?

A No.

Q As I understand it, you have built into your proposals some aspect of the concept of interdependency or dependency at this airport; am I correct?

A Yes.

Q Did you in that sense do any mathematical calculations before the time that the assumptions were made that are reflected in your exhibits?

A I did mathematical computations. I don't understand—I did mathematical computations.

Q And did you assume that the airlines were a hundred percent responsible for the flow of passengers in the airport?

A I wouldn't characterize it as them being a hundred percent responsible, no.

Q Did you quantify it or make any assumption specifically as to the percentage of responsibility as between the community and the airlines regarding the presence of people in an airport that you have called the flow of passengers?

A Well, I understood the study related to the costs relative or incurred in the airport. So my view has been confined to the activities within the airport boundaries.

Q Did you at any time consider or attempt to quantify the extent to which the community is responsible for

bringing people to the airport, either enplaning or deplaning?

[383] A No.

Q Did you at any time review any aspects of the master plan study underway at this airport?

A I have not seen that.

Q You're aware that it is ongoing or not?

A I understand that there is one, yes, being prepared.

Q And are you aware that the airlines are provided with all of the documents that relate to the master plan so that they can review it and provide whatever input they might feel is appropriate?

A Yes.

Q I would assume in your job you've been involved not only in cost allocation, but you've been involved in the preparation of revenue budgets and expense budgets?

A Yes.

Q And I take it you would agree from a business person's point of view that the further you can look into the future and try and crystal ball the nature and extent of the expenses your business might have, the better off you are in making current and near-term business decisions?

A Yes.

* * * *

[392] Q And the landing fee at Kent County has a 50 percent factor attributed to the weight of a plane and a 50 percent factor attributed to the frequency of landings; am I correct?

A Yes.

Q So that component of the so-called total landing fee has never changed for any of the years you've studied the Buckley plan. Am I correct?

A Yes.

Q The Indianapolis landing fee contested in that case had a different weighting, did it not?

A Yes.

Q And there, 90 percent of the total of the landing fee was related to the weight of the aircraft and ten percent was related to the frequency of landings. Am I correct?

A Yes.

Q So that type of 90 percent/10 percent landing fee involved in the Indianapolis case placed a much greater cost burden upon the commercial airlines than would the type that this airport has?

A That's true.

* * * *

[397] Q Would you agree with me that the stated purpose of the Buckley methodology is to allocate costs rather than allocate revenues?

A That's the stated purpose, yes.

Q And in multiple different ways, your proposals or the proposals you worked with others on allocate costs and revenues?

A I would say that it allocates costs, and in many cases allocates costs based on revenue.

Q Did you personally make any study to determine whether a cost reduction or reduction of the rates, fees and charges in this case would automatically lead to a reduction in passenger ticket prices?

A No.

Q Have you looked at other airport methodologies to [398] determine how they handled depreciation for periodic maintenance charges?

A Not as a specific study, no.

* * * *

* [402] The rate study obviously refers to a number of past costs that had been incurred and which are carried forward over a period of time which may be a useful life. Can we agree that there is no question about whether there's a fraudulent presentation of costs incurred?

A No question in my mind that the assets shown there are in all probability true assets.

Q And there's no question from your vantage point regarding the wisdom of the past expenditures of the air-

port from a management point of view, as I understand it; am I correct?

A You're correct.

* * * *

[404] Q And we all recognize by now that this dispute in large part is because of that statement of philosophy or principle of Buckley with which the airlines do not agree?

A I would not agree with that.

Q There are other disputes, or that's not a large dispute?

A Well, I don't believe the issue is cross-crediting of excess revenues. I believe the issue is one of proper crediting of costs.

Q Okay. The net result of which is to shift revenues, certainly, if you go to a residual lease; am I correct?

A To me the net result is shifting of costs.

Q The net effect of which would be to reduce airport—

A That's correct.

Q Excuse me. To reduce airline charges?

A Yes.

Q And I take it you're not moving costs around without also looking at how you would move revenues around?

A That's true. I think we've demonstrated that.

* * * *

[441] Q I'd like to close with several questions dealing with what I think Mr. Horngren has called the due process setting in which these rates are established. Bear with me for a moment. Federal money is deducted before the costs are collected and distributed. Am I correct?

A Yes.

Q State money is deducted before the costs are collected and distributed?

[442] A Yes.

Q The airlines can leave the airport if they either don't like the current charges, the current business community, what they see in terms of future costs to be expended. Am I correct?

A They may leave, legally speaking, yes, it's my understanding.

Q And if they leave, it's without a forfeiture in the lease, certainly, under circumstances where there is no longer any lease. Am I correct?

A You're correct, my understanding.

Q And their capital investment at the airport would typically be relatively insignificant as a percentage of the landing fees, terminal rental rates paid to the airport, would it not?

A I don't know that for a fact.

Q Whatever it would be would have been depreciated over the years by the airlines, would it not?

A In all probability.

Q And if there is any major contract that the airport has on the horizon, no matter what it's for, a new runway, expansion of a terminal, there is at least some lead time to the airlines to look into it, to learn about it, to attend meetings, to protest, and to even wait until the particular project may be approved and implemented. Am I correct?

[443] A Yes.

Q And most of these contracts as it relates to construction of items at the airport are put out for public bid, are they not?

A I believe so.

Q And typically the public bidding process is supposed to be a competitive process that is supposed to lead to lower bids that can be accepted if the process works in optimum fashion?

A That's my understanding.

* * * *

TRIAL TESTIMONY OF CHARLES T. HORNGREN

[474] Q Does the rate study properly allocate costs to the various users in the terminal building?

A In my opinion, it does not. I think that I should preface that conclusion by expressing my overall philosophy on this stuff.

Q Would you please do so?

A Well, I think that I go at things in as objective a manner as I possibly can. I try to examine a problem in its entirety. I never try to lose sight of the big picture. I think that you should always start by looking at the grand total, and whatever problem you're studying, you should back off and look at it in the large in the context of costs and revenue analysis. I think it's important to never overlook the interrelationships of the economic activities in a particular entity. In this case the entity is the airport. And therefore, I've reached a conclusion that the rate study [475] does not recognize those interrelationships in an appropriate way.

Q How about the allocation of costs to the various users in the terminal? What is your opinion of the way the rate study goes about doing that?

A Well, I believe it is flawed because it fails to recognize the dependence of the concessionaires on the presence of the airlines.

Q Is there anything of a quantitative nature that you can cite that demonstrates the situation?

A Well, to sort of strike home in my own mind on that, I usually find relationships between revenues and costs to see whether they pass what accountants sometimes call the smell test. And in this case the car rental revenue area showed us a revenue of something like, for 1987, \$678,000, and the costs allocated to the generation of that revenue were \$28,000, giving a margin of \$650,000, which is 95 percent of sales. I find immediately the red flags go up and say any sub-unit, any segment of an overall facility that has a revenue margin, a margin on revenue 95 percent of sales, there's got to be

something going on here that is being overlooked. And so, in my opinion, that measure of performance is faulty because the full interactions or relations or dependence of the rental car operations is not included in cost allocation.

Q How about the parking lot? It's treated as a stand-alone [476] revenue producing cost center. Can you give us your opinion of the way it is handled in the rate study and the allocation of costs to the parking lot?

A Yes. My opinion is similar to the one that I just expressed with respect to the rental car concessionaires. That is, the parking lot is a part of an integrated airport facility, and the cost allocations should recognize that in evaluating performance.

In this case the revenue of the parking lot for '87 was over \$1,600,000, and the costs allocated to it were 688 or something like that, to give a margin of \$925,000 on sales of a million six. That is a very, very tidy margin, and immediately, again, I look at the situation and say the economic factors that are playing around here haven't been recognized to the extent that they should.

Q I call to your attention the rate study, and I call to your attention the particular line—the rate study is Exhibit 6, and turn to Exhibit 7 of Exhibit 6, Page 2 of 4.

A I have it.

Q I notice there's a terminal building addition, which is the line—I believe it's C-63, and that is the F line under Passenger Terminal Building on Page 2 of 4 of Exhibit 7 of Exhibit 6, the very item Mr. Hunting, counsel for the airport, picked yesterday to demonstrate how their system works, and I ask you what the net for rate base is.

[477] A That is in Column 5, and it is \$3,174,000.

Q What is the yearly average charge that is made by the rate study for the terminal building addition costing 3—that is in the rate base at \$3,174,000?

A Well, that's in the final column, and it's \$311,600.

Q In ten years, how much of the cost will be recovered from the users of the terminal through the Buckley methodology, or the rate study, as I should call it?

A How much of the cost? Well, in ten years, if you multiply the ten times the three million—or, excuse me, the \$311,600, in ten years it will recover the rate base cost.

Q For how many years will the—for how long will the rate study keep that terminal building addition? Will it continue to charge for the terminal building addition?

A It will continue to charge for the addition over the useful life as planned in the schedule, which would be 360 months or 30 years.

Q Would you take another look? I think that may be 340.

A Excuse me, 340.

Q So it's not quite 30 years; is that correct?

A Not quite 30 years.

Q And during that not quite 30 years, how many times the original amount in the rate base, approximately, will this system charge out to the users?

A Well, if you multiply 30 times the \$311,600, you get [478] \$9,300,000. Rounding, \$9,300,000.

Q Assuming, since it's a couple years short of 30, I would assume, then, we're in the \$9 million range?

A Yes.

Q So the net for rate base, which is the original cost minus the federal investment, is \$3,176,000, and the recovery over a 30-year period will be \$9 million; is that correct?

A That's correct.

Q Do you consider that to be an appropriate way of charging out the cost for that terminal expansion?

A That's a method of pricing where you mark up cost. That's what the carrying charge does. It is a markup on historical costs. For whatever justification that might be offered, it is a markup on historical cost. If you do it the way accountants account for historical cost, you would

take the \$3,174,000, and on a straight line depreciation basis there are two aspects to it. First, you deduct the residual value. In other words, if you buy an asset for \$3 million, say, 30 years from now it's still going to be worth something—

MR. HUNTING: I'm going to object, Your Honor. There's no testimony that the airport has residual value. Quite to the contrary, I think that the evidence, if we get into this kind of issue, would indicate quite to the contrary.

BY MR. MALLETTE:

Q Well, to simplify things, assume the terminal building [479] will be rubble or vaporize at the end of the 30-year period.

A And that, of course, is an assumption in favor of a higher expense per year than if you assumed that there was a residual value. So let's assume there is rubble, so there's no residual value. Then you'd take the \$3,174,000 and you'd divide it by the 30 years to get a depreciation expense, this is the way the accountants do it, per year of \$105,800 if you use a full 30 years. In other words, it's roughly \$100,000 a year.

Q So they're charging roughly three hundred instead of a hundred thousand which they would charge if they followed depreciation; is that correct?

A That is correct.

Q And that is then charged out to the users in the terminal; is that correct?

A That's correct.

Q When the charges in the terminal are underallocated to the concessions by their rate methodology, what is the effect on the charges allocated to the airlines?

A The airlines are then overallocated costs.

Q Does it work the same way with respect to the parking lot?

A Yes.

* * * *

[511] Q And, of course, I take it you recognize that the doctrine of dependencies or interdependencies is a little bit easier to look at in a hub airport as it might relate to what the passengers are doing in the airport, because in a hub airport many of those passengers never get out in the community and don't come from the community?

A Well, that's true. The passenger flow is different in a hub airport than in a non-hub airport.

Q And what would you call a non-hub airport in airport parlance?

A Well, I don't hold myself out as an expert in airport parlance. I'd call it a non-hub airport.

Q Have you heard the phrase O & D?

A Undoubtedly I've heard a lot of acronyms, and they stick with me for a few seconds sometimes and then I have to be reminded again as to what they mean.

Q Well, let's try to make this simple. Would you agree from what you know about the Kent County International Airport that for the most part it is origin and destination traffic, and not many people end up in the Kent County International Airport in the terminal building because they're midway between a trip that they're taking between point A and point [512] B?

A That's my understanding.

Q So there would be a greater likelihood, would there not, in an airport such as the Kent County International Airport, which is not a hub airport, that the people coming into Grand Rapids have some direct connection to the community that they're coming to?

A Yes.

Q And that connection could be business, social, personal, recreational, family, whatever?

A Yes.

Q And people don't fly today with the cost of flying from point A to point B just to take a joyride like teenagers may go to the mall; am I correct?

A Yes.

Q And the desire of people to travel from point A to point B is ancient, is it not?

A Yes.

Q And it certainly predates planes?

A Yes.

Q And it predates any mechanized mode of travel, does it not?

A Yes.

Q And I were to guess if we could go back far enough that the first means of travel was probably walking and there [513] wasn't any common carrier for hire you could use?

A Yes.

Q And we could go through the whole litany of history up to the time where we now have airplanes?

A Yes.

Q And previously trains were a mode of travel?

A Yes.

Q And the Federal Government has been very active in one way or another in trying to provide funds to the infant industries at different periods of time in U.S. history as it relates to the transportation industry?

A Well, certainly with respect to airport building, yes.

Q With reference to this cushion for the airport that you regarded as handsome, have you made any assumptions whatsoever about the continued availability of federal funds for expansion?

A No.

MR. MALLETTE: Object. I believe we have to take the law as it is, and I don't think we factor in the possibility Congress might change it.

BY MR. HUNTING:

Q Let me ask it this way, because Mr. Mallette made a good point, Mr. Horngren. We don't know whether the law will change or not, do we?

A No.

[521] Q In indicating that the airport would have a handsome cushion, I take it you were suggesting a cushion for the future?

A For continuing to operate the airport in a—to fulfill its operating needs, yes.

Q And did you study the past operating needs?

A Yes, in the sense that there was a revenue in excess of the operating expenses and an asset fund, the restricted assets that had accumulated to \$9 million.

Q Do you recall how those were earmarked as it relates to future projects?

A They were earmarked or subdivided for various reserves, yes.

Q And did you study the FAA approved list of projects attached to the affidavit of Mr. Dean Nitz of the FAA as filed in this matter early in 1989?

MR. MALLETTE: Objection. The affidavit stated specifically the FAA had not approved funding for any of the projects.

THE COURT: That's not the question. Overruled. You may answer.

THE WITNESS: No.

BY MR. HUNTING:

Q Have you looked at any current FAA list of projects that [522] Mr. Nitz will sponsor by his testimony here in this case if we can't reach a stipulation on it?

A No.

Q Have you looked at any airport recent or current listing of construction projects as it might relate to your view of what would be a handsome or ample cushion for this airport in approaching its future?

A I did see, I think it was a part of the Defendant's exhibits, a list of planned expenditures. I did not, however, see a list of approved planned expenditures. I viewed it as consisting, as far as I can recollect, mostly of wishes, not approved projects.

Q How would you know they're wishes if you don't relate it to FAA file information?

A Well, the thing that as an accountant convinces me the most is if there is an approved project that is going to be launched in the foreseeable future, and anything beyond that are a bunch of hopes and expectations.

* * * *

[535] Q Okay. Let's take a little basic course in economics, and I probably shouldn't do this with you, sir, but let's assume with our airport that we've got ten planes that come in every day, and they're full, and that takes care of the current need in the community in terms of flying in and out. Are you with me?

A Yes.

Q What if the airlines all of a sudden bring 30 planes the next day into the airport? Are those planes going to be full, either coming or going?

A The next day? Probably not.

Q Why not?

A Probably because the passenger flow is not sufficient to fill the 30 airplanes.

Q The community base is not sufficient to fill the second 20 planes; correct?

A Well, that may be an exaggeration, but I accept the substance of what you said, yes.

Q And the substance of what I said is known as derived or [536] primary demand, is it not?

A Yes.

Q And in just simple economics, it basically means that there is a certain volume of demand in a given pre-existing situation, in this case desire of people to travel, and the fact that the airlines may triple their planes coming in doesn't mean that all of a sudden you've got a triple need or a triple demand in the community. Am I correct?

A That's correct.

Q Doesn't that indicate that somehow or other the planes coming into a community relates to the community needs?

A Yes. Planes come into the community to serve a particular area in relation to another area; throughout the world, perhaps, in some certain cases.

Q And the airport is there also to serve the people in the community?

A Well, of course it's there to serve the people in the community.

* * * *

[541] Q Does that kind of significant percentage come into play at all if someone were to theorize whether, if you reduce the charges at the Grand Rapids airport, it'll mean the public gets cheaper tickets?

A Well, if you look again at the grand total for passengers in, say, the whole American airline system, the answer is the less costs that the airlines bear, in total the likelihood of less charge per passenger goes up.

* * * *

[542] Q I almost hate to ask this question, but I think I have to. It's unclear to me whether you are or are not applying concepts of by-product, joint product, and transfer pricing as it relates to your current testimony in this case. Are you or are you not?

A I am not in the following sense. The term by-product method, and I emphasize that whenever I talk about by-product, I use the term "by-product method" as an analogy, and I always try, at least, to say we're talking about for pricing purposes here. Costs per se are used in monopoly situations and in government contracting situations as a basis for establishing a price. You look at costs as a jump-off place to then negotiate what a fair price is, and I did not use by-product here because I did not want to—by-product method here because I don't think it's necessary to get to the essence of the matter. The essence of the matter is an integrated airport facility, and you can talk about it without dragging in all of those terms that seem to cause a lot of people a lot of trouble.

Q In fact, I think you called it fog, as I recall the word that you used in your deposition. Am I correct?

A I may have used that. I don't like fog. I prefer a clear [543] day without snow.

Q Do you remember, Page 200, that you volunteered in your own words that getting into some of these things that were difficult and technical like by-product, joint product, and transfer price was like getting into a fog?

A I may have expressed it that way, yes.

Q You may help me quicken the pace here, which would please me to no end. Then I assume that if by-product theory is not involved, that obviously joint product theory is not involved?

A I don't think it's necessary to analyze this case, no.

Q And can we rule out transfer price, too, so I can set aside files on that third category?

A Given my analysis of the case, we can set that aside. If you want to explore it, I will, but again, I don't think that it clarifies matters from my point of view. But I'm not hesitant to talk about it if you want to.

Q I don't want to talk about it unless you feel that you or Mr. Dompke are saying it's part of the case. And as I understand your testimony, you feel comfortable without relying upon by-product, joint product, and transfer price considerations. Am I correct?

A I stand by my direct testimony, yes.

* * * *

[544] And as a matter of fact, the word "by-service" or "joint service" doesn't even appear in any of the glossaries of any of your textbooks; am I correct?

A That's correct.

Q And the word "interdependencies" doesn't appear in the glossary of any of your textbooks, either, does it?

A That's correct.

Q Have you ever seen any effort or study to specifically try and quantify the flow of passengers through an airport as it might relate to which ones use some services, which use none, and which might use all of them?

A In the Grand Rapids case, are you talking about, or in general?

Q Well, let's talk about the Grand Rapids case.

A I don't recall. I may have seen such an analysis, but I don't recall seeing it.

Q Have you seen such an analysis elsewhere?

A I, again, may have seen one, but I don't recall.

Q I take it that there must be some people who come to an airport and buy nothing?

A Yes.

Q And I would guess there's probably nobody that comes to an [545] airport and buys everything?

A Yes.

Q Have you in particular reviewed any of the following pages of depositions of airline agents in this case regarding interdependency or dependency theory: John Sorenson, Page 147; Mark Fischer, Pages 21 and 22; Carolyn Lowe, Pages 117 to 118 and 54 to 57; Dan Hindes, Pages 15 to 17, 30, 51 and 52; Paul Hegedus of Comair, Pages 18 and 19; Jerome Barnack, Pages 10 to 22, 97 to 115?

A No.

Q Have you ever drafted an airport lease?

A No.

Q Have you ever seen an airport lease that contains a definition of dependency or interdependency in any sense in which you've used it here?

A I don't recall seeing those terms used in any lease.

Q Did you make any study whatsoever in an effort to quantify or compare any risk the community may have had with reference to the airport compared to any risk that the airlines have had with reference to the airport?

A No.

Q I take it you're aware that any one airline can basically leave the airport whenever they want and have very little forfeiture under the lease terms except perhaps

for what their undepreciated capital facilities might be that can't be moved?

[546] A Yes.

Q And any airline could, if they want, whether they're under a lease or not under a lease, cut all their flights back to one and still have the privilege of using all airport facilities?

A Yes.

* * * *

Q As I understand it from your deposition, the Buckley methodology in theory and as applied does not violate the Cost Accounting Standard Board's rules; am I right?

A Well, I did not match the Cost Accounting Standard Board rules against the Buckley principles, mainly because I thought it wasn't relevant since the CASB rules do not apply to airports.

Q So, obviously, there's no violation if they don't apply. Can we agree on that?

A Given your—the way you phrased it, I agree.

[547] Q And you told me at your deposition that you were not aware of any violation of GAAP, meaning generally accepted accounting principles; am I correct?

MR. MALLETTE: I'll object. I think he has to specify GAAP with respect to what document.

BY MR. HUNTING:

Q Let's take the rate study and its implementation. Do you recall indicating in your deposition that you felt there was no violation of the generally accepted accounting principles?

A With respect to the rate study, since GAAP does not apply to a rate study, I agree.

Q So to simplify this, neither CASB or GAAP apply; correct?

A Correct.

Q Have you studied any publication of Moody's on any issue in this case?

A No.

Q Moody's does deal with public entities in general, does it not, in terms of credit rating, reports, status alerts and so forth?

A Yes.

Q Do you know in fact whether it does deal with airports in particular?

A Well, since I didn't study Moody's in connection with this case, I can't answer that question with authority. I would assume that it does, but that's just an assumption.

* * * *

[548] Q So wouldn't that indicate that somehow in the last ten years there must be something pretty good going on in Grand Rapids to cause all of these commercial airlines to want to have a presence here?

A I would assume that the economy must have been good enough to attract them, yes.

Q And that's just basic market economics, is it not?

A Yes.

Q And if they perceive the economy to become static or if they foresee the economy will turn sour, they can leave?

A They certainly can, yes.

* * * *

[551] Q So at least to that extent. Buckley's treatment of the non-aeronautical revenues is the American way?

A It is the American way in the sense that the management then has in a unique facility the ability to chop it up and run profit-making enterprises side-by-side with nonprofit-making monopoly enterprises and ignore the integrated facility.

Q Is your opinion to any extent in this case based upon conclusions as to monopoly?

A It's based on the conclusion that there is a natural monopoly, that an airfield that's doing commercial service is a natural monopoly.

Q You used the word "chop up." Realistically, the Buckley methodology for 20 years has chopped up or created separate, distinct, well-described explicit cost areas, has it not?

A Yes.

Q And the cost areas as described and implemented have remained the same for 20 years, have they not?

A Yes.

Q I would have to assume that if you took the airport at any instant in time and you took a cross-section of it, there would be probably some arbitrariness or some unfairness in some part of a cost allocation at an instant in time almost by definition. Am I correct?

A Correct.

* * * *

[557] Q Now, what would prevent general aviation, recognizing that they don't put as many people through the terminal, from coming in and saying the same thing to the extent they have some smaller contribution to the flow of passengers?

A I can't—I haven't looked at it from a general aviation point of view. As I've said before, what I'm looking at is the total picture and the fact that the airlines are being affected as a buyer of airport services by the financial impact of a pricing plan that the airport runs, and it looks like from all of the tests we've run that the cash position plus the cash generating power is excessive. And therefore, they have a complaint because the price is excessive of services that they're buying from a monopoly.

* * * *

[573] Q And of course, in government contract situations the government has its own policing and auditing powers and policing and so forth?

A Correct.

Q And in this instance the FAA under grant assurances could look at the reasonableness of these rates and charges, do you know?

A I don't under—I'm not aware of the mechanisms that the FAA has to determine reasonableness of rates and charges. Since I don't know the facts, I can't really offer an informative answer to that question.

Q Have you looked at the airport user flow chart that Mr. Dompke marked Exhibit 303?

A Yes.

Q Is that technically a by-product split-off point chart or not?

A I don't look at an airport as a by-product split-off situation for reasons that we've already discussed. All it [574] does is blow fog or blizzard into the analysis.

Q Did that happen in Indianapolis?

A No. As I said before, I used a by-product method. I did not talk—I looked over my deposition and testimony in there, and I don't think I called anything a by-product or a joint product. I talked about by-product methods and joint product methods, and I think used by-products and joint products as analogies in trying to get a fix on what was going on in Indianapolis.

Q Specifically, is Mr. Dompke's chart, Exhibit 303, in your opinion a by-product split-off point chart or not?

A No.

Q As I understand it, the affidavit that you filed in this case, you relied upon the figures of Mr. Dompke?

A I relied on the figures of Mr. Dompke, but at that time I checked every figure line by line back to the sources.

Q I'd like to ask you a couple quick questions about Indianapolis. First, Indianapolis was switching from a residual methodology to a compensatory methodology, was it not, when it adopted the fees that became disputed in litigation?

A Yes, to the best of my recollection, that's correct.

Q So simply speaking, it was the airport in the Indianapolis case that was changing the status quo or the

equilibrium or the entire type of relationship that I've depicted on the [575] blackboard?

A That's correct.

Q And prior to the time that the Indianapolis Airport sought to make that change, the airlines in one fashion or another had already had access to or some share of the non-aeronautical or the concession revenues, had they not?

A I wouldn't express it in that manner. The substance of what you say, I accept for responding, and my answer is yes.

Q So whatever it was in substance that the airlines had at Indianapolis before the disputed rates, the new compensatory approach of the Indianapolis Airport Authority was designed to take that away?

A Well, "take that away" is one way of expressing it. It certainly changed the method for setting rates.

Q You'll recall our discussion at your deposition in which you and I shared the same concern about a seller attempting to have legal standing to speak for the interests of a buyer?

A Yes.

Q And the example I used in your deposition was the same one I used in court today involving General Motors as a seller and the public as a buyer and the safety interest in recalls?

A Yes.

Q And we both agreed we would be troubled by having the seller in that kind of setting attempt to speak for the buyer?

A That's correct.

[576] Q And typically the seller and the buyer in most business situations where money passes between them have inconsistent interests?

A Correct.

* * * *

[578] Q The next page, you indicate that as an author you had spent, quote, "much time interacting with the business community to determine new uses of cost ac-

counting data, and to gain insight into how changes in technology are affecting the role of cost accounting information" in the middle of the page marked Roman numeral XX; am I correct?

A Correct.

Q And it's my understanding that as to your testimony in this case regarding cost accounting implementation, you did not discuss that with any airport property managing agent or any airport manager; am I correct?

A Correct.

* * * *

[588] Q Do you recall using the word due process?

A Yes.

[589] Q And you used it in the context of the questions that I had asked of you when I had used the phrase built-in protection in the framework within which the cost foundation of the airport is established and rates are developed. Do you recall that?

A Yes.

Q And you agreed with me that there was some due process in this procedure that involved the removal of federal funds, the removal of state money, the ability of the airlines to leave, the fact that major contracts would be subject to public hearings and scrutiny, that there was public bidding on those contracts, and that the cost was a local historic cost. Do you recall those series of questions in your deposition?

A Yes, I do.

Q And you indicated in your deposition, did you not, that in your opinion that constituted some form of due process?

A Yes.

* * * *

[592] [A] Moreover, you can reverse that theory and say the chain continues because if the airlines are present, the presence of the concessionaires is dependent on the presence of the airlines. And therefore, you can say that the concessionaires' demand for service from the airport

is derived from the presence of the airlines. If the airlines weren't there, there would be no concessionaires there.

* * * *

TRIAL TESTIMONY OF DEAN NITZ

* * * *

[631] Q Sir, does the Federal Aviation Administration develop a comprehensive national plan for the development of airports across the country?

A Yes, we do.

Q What is that called, sir?

A It's called the National Plan of Integrated Airport Systems.

Q Okay. Sir, why does the FAA develop such a plan?

A Well, the plan is to attempt to identify the needs of the—of development to meet the forecasted demand, and it's used as a tool both by the Federal Aviation Administration and by the Congress in development of budgets to support that kind of development.

Q Sir, does it deal with short- and long-range development?

A Yes, it covers a period of ten years.

* * * *

Q The Plaintiffs in this action have represented to this [632] Court, and I quote, that Kent County International Airport is, quote, "primarily a general aviation airport with some commercial air carrier service." Sir, could you please tell the Court how the Kent County International Airport is designated under the national plan?

A Kent County International Airport is designated as a primary commercial service airport.

Q Sir, based on your experience, can you give me an opinion as to the quote that I just gave you from the Plaintiffs' brief?

A I think identifying it as primarily a general aviation airport is very subjective and not an accurate picture

of Kent County International Airport. I would think that the major costs of acquisition and development of this facility have been primarily for meeting the demands of commercial service.

* * * *

[637] Q No. What I'd like you to do is to tell us the process by which an event—excuse me, a project is listed on that list.

A Well, on an annual basis we review the National Plan of Integrated Airport Systems for each airport in the system. We will identify, as I said previously, development that has been perhaps shown on the master plan and we have reason to believe that the sponsor is going to proceed with; other information from the state system plan; and, from our own experience and knowledge and our familiarity with the airport, we develop a plan and have it staged here to show the needs of that community and that airport. That is submitted to me, and if it meets with the expected forecast, it will be approved, and it is then submitted to our regional office in Chicago and out into our national office. And every two years the federal government publishes a report called a National Plan of Integrated Systems whereby these costs are all incorporated into that plan.

* * * *

[638] Q Sir, looking at Page 2 of DA-35A, can you please identify for me the total of the one- to five-year cost of projects at this point?

A The total cost for the one- to five-year time frame is \$19,590,000.

[639] Q And, sir, that's the total cost of the entire projects; is that correct?

A Yes. That includes engineering costs and contingencies for that item.

Q And it includes local share and federal share of projects?

A Yes.

Q Can you please tell me the total of the six- to ten-year compilation on Page 3 of DA-35A?

A The total for the six- to ten-year time frame is \$20,670,000.

Q And can you give me the grand total on Page 3 of DA-35A?

A The grand total is \$40,260,000.

Q Of that \$40 million total, we discussed that some will be local share and some will be grant money. Can you give me an idea of the types or the percentages of grants that would be available for the projects listed on Pages 2 and 3 of this exhibit?

A Generally, the federal share of this type of development would be 90 percent, except for terminal development, which would be eligible at the rate of 75 percent.

* * *

[640] Q Is it possible that Kent County International Airport would have other projects that they would be working on that would not be eligible for FAA funding?

A Yes, there are certain items. Parking lots are not eligible for federal funding, and non-public areas of the terminal are not eligible for federal funding.

Q When you say "non-public", are you talking about revenue producing areas?

[641] A Yes. Any area that generates revenue is not eligible for federal funding.

Q And any projects that fit into any of those two categories you just talked about as non-funded areas, such as the parking lot area, as far as the FAA is concerned, they could be undertaken by the Kent County International Airport; is that correct?

A Absolutely.

Q But they would have to seek other sources of funding for those projects; is that correct?

A That's correct.

Q Would you consider the construction of an air cargo facility being a revenue producing area, sir?

A Certain portions of that type of complex would be eligible if the complex is serving more than one tenant and a tenant does not have exclusive rights to it. The apron and a taxiway leading to that complex would be eligible for federal assistance.

Q But the portions that do not have those kind of grants do not appear on this list; is that correct?

A That's correct.

* * *

[642] Q Sir, can you describe to me what grant assurances are?

A Grant assurances basically summarize the obligations of the sponsor, promises to fulfill as a result of receiving the federal assistance.

Q Are all grants conditioned upon the grant assurances?

A Every grant must have a copy of these assurances attached to it. In fact, the sponsor in this case, Kent County, would be required to submit these assurances with their application [643] for federal funding.

Q And sir, this is a document that is substantially similar to documents that you have in your office; is that correct?

A Yes, it is.

Q And in fact this document is the grant assurances being utilized by the FAA nationally for purposes of grant assurances during fiscal year 1990; is that correct?

A That's correct.

Q So basically, any grant during that fiscal year will be conditioned upon the agreement of the sponsor of the airport to agree to abide by the conditions of these grant assurances. Is that correct?

A Yes.

Q And in fact, any grants made to Kent County International Airport are going to be conditioned upon the grant assurances, either these or earlier grant assurances that are substantially similar to this; is that correct?

A Yes. This particular assurance is dated October 1, 1989, and as Congress passes additional laws, these assurances are changed from time to time. So the previous grants that we issued to Kent County do have assurances of this type, but may not contain the exact language as this one we have here for FY '90.

Q Are they basically—fiscal year '90?

A Fiscal year '90, yes.

[644] Q Are they basically updated on an annual basis, sir?

A In recent history they have been, yes.

* * * *

Q Sir, if you can go back to DA-35A, I'm going to refer you to Page 2 of that document. I want to make sure I understand, how this works. If Kent County International Airport has sponsored a project on Page 2 of the document, came to the Federal Aviation Administration with a request or an application, I think you called it, for any of the projects on Page 2, they would then produce to you the application and an agreement by which they would agree to abide by the terms and conditions of the grant assurances. Is that correct?

A Yes.

Q And if the grant were approved—is that the correct term?

A Um-hum.

Q If the grant were approved, then Kent County International Airport would receive the federal funds as well as the obligation to abide by the grant assurances?

A Yes.

* * * *

TRIAL TESTIMONY OF ROBERT M. ROSS

* * * *

[667] Q Let's try to get to the '80s, Mr. Ross. Would you indicate in this late 1960s, early 1970s program the utilities and the sewer and water activities that took place as it related to the airport?

A Yes. The continuing programs of the \$8.3 million in revenue bond funds went on to the bringing of the sewer and water into the airport. Prior to this time we had been utilizing well water, and we had an aeration pond system for a sewage system on the field. So new City of Grand Rapids water was brought into the airport, and the sewer system as well.

We built some car rental service areas at this particular time. We built additional carousels, or really new [668] carousels, the first time we used them in the ticket wing of the terminal building, and made a major construction underneath the building to develop what we call a tug-way where the baggage carts would come in, go underground, the baggage would be put on the conveyor and brought up to the carousels in the ticket wing section of the building.

In all of these projects we were very fortunate in that shortly after, a year after we sold the revenue bonds and had the funds for this additional development, and many of the items were state-requested, the Federal Airways and Airport Act came into existence in nineteen hundred and seventy, and this was the first time the airports had a trust fund from which construction funds could be taken based on enplanements and entitlements. So we were able to add to our \$8.3 million in this program with many of these projects that I mentioned, which went on from 1969 to 1974, \$6 million in addition of federal funds under the AIP program, making basically a total of project funds during that five-year period of \$14 million.

Q And the five-year period would be roughly late '60s into '73 or '74?

A '69 to '74.

Q Quickly tell me what, if anything, happened to the hotel and to FBO facilities and freight building activities in that time frame?

A Those were additional projects in this overall program. [669] We did expand the hotel with another 30 rooms, 35 rooms. We did build a 12,000-square-foot air

freight terminal building, and I mentioned these other projects as well, all during that particular period.

Q What about Centurion? When did they come into existence?

A Yes, that was our second fixed-base operator, so-called, and actually their hangar, major fixed-base operator hangar was built also in this period.

Q Now, what extent did that source of money deal with the parking lot and ramps and the runways?

A Yes, the parking lots were also expanded. I think we expanded the parking lot for an additional 1,000 vehicles, and I think I mentioned earlier before lunch that we overlaid the runway in that particular project as well in order to give us the strength to take the new jet aircraft.

Q And what about taxiways?

A We did build some additional taxiways because we, as I mentioned, we had extended the runway an additional 1,000 feet in the program. So there had to be a connecting taxiway to be built as well.

Q And can you give me some brief idea of how taxiways and runways interrelate generally before we have you provide a description of this exhibit later on?

A Yes. Basically the taxiways provide the access and egress from the operating runways in order to allow the aircraft to [670] proceed from the runway and to the aircraft ramps or the general aviation ramps.

Q As I understand it, the particular program you described involved bond issue money, and then later on also involved the availability of federal funds?

A That's correct.

Q At this point would you give me some kind of brief categorization of the types of projects you have, the way in which projects may develop, and the sources of funds or the sources of approval for the different types of projects that airports have, doing it in a general way, if you will, first?

A Yes. Well, of course, it starts locally with our own department, and then the Aeronautics Board, our staff develops and recommends these particular projects, and they very frequently have developed out of needs of our tenants, the airlines, general aviation cargo people as well. Those also would have been included in the master plan and application, and then if they are eligible, application is made to the FAA for participating funds. A number of the activities certainly do not require or are not eligible for federal funds and would have to be built completely out of local funds. That's an activity between the Aeronautics Department and the Aeronautics Board, and the Board can approve those non-federal projects within their own operation.

Q Are there times when there are overlapping of these [671] projects in the sense you may have something under consideration, but you're not sure whether you will get federal or state money or have available local money?

A Yes. The process does take time when we make application for federal funds, and there's always a period there in which we're not sure whether we can go ahead with a project or not until we get actual grant approval.

Q Are there any major projects for which federal funds might become available that do not involve some type of public hearing?

A I can't think of anything offhand.

Q I think we've gotten—

A Yes, excuse me, I do. We did have a project. It was a national program for increasing employment and affected highways and airports as well, and we were requested to make a determination of a project that we had in our master plan that was fairly simple to accomplish and would involve a lot of labor. We had an expansion of our east ramp which we felt fell into that category, and that was—there was no public hearing on it. It was in accordance with our master plan and it didn't have any environmental problems or anything of that sort in it. It was purely the FAA's approval for the issuance of the

grant and, of course, the initial approval of the airport board.

Q Can I assume that typically while you have been director [672] of the airport, that you have attempted to seek out whatever funds may be available for the projects that you have under consideration?

A Yes. We try to take advantage of every possible federal aid program that we are eligible for.

* * * *

[718] Q Calling your attention to DA-35A, am I correct that no grant applications have been made by the Board to the FAA for any of those projects? I believe your counsel's handing you a copy. You might take a look if you don't know.

A Okay. What was your question again, Mr. Mallette?

Q Yes. Have any grant applications been made for any of those items?

A No, I don't believe so.

Q Have any of them been approved for construction by the Board?

A No, they have not.

Q Am I correct that the only fee paid by locally based general aviation aircraft for use of the runways and taxiways is the fifty-cent landing fee?

A Fifty-cent landing fee?

Q I'm sorry, fifty-cent—I made a mistake. Is the only fee paid by general aviation aircraft for use of the runways and the taxiways the four cents per gallon fuel flowage fee?

A Yes.

Q I hand you Plaintiffs' Exhibit 20, Rental Fee Recommendations of James C. Buckley, and I call to your attention page Roman numeral III-5, which is Bates number at the bottom 001869.

A Yes, I have it.

[719] Q And I'll ask you if for the three years beginning January 1, 1968, Mr. Buckley recommended that the fuel flowage fee to general aviation be increased by approximately 12 percent?

A Yes.

Q And did you follow Mr.—did the Board follow Mr. Buckley's recommendation?

A No.

Q And what was the fuel flowage fee when the airport was opened in 1963?

A Three cents a gallon.

Q I'm sorry. I misspoke about the four-cent rate. Is the current fuel flowage fee to general aviation, locally based, for use of the runways and taxiways three cents per gallon?

A Current?

Q Yes.

A Current is four cents a gallon.

Q I see. When did you go from three to four?

A Approximately four years after we opened the airport.

Q So since 1967 it has been at four cents a gallon; is that correct?

A That's correct.

Q I hand you Plaintiffs' Exhibit 25 and ask you if that isn't a letter from S. LeRoy, Manager of Properties of United Airlines, to you dated June 25, 1987?

A Yes, that's what it appears to be.

[720] Q And am I correct that when I handed you that letter at your deposition, you told me it looks like it could have been written last week?

A Perhaps. I don't recall, Mr. Mallette.

Q Isn't it true that from 1970 to the present, you and the Board have known that the airline industry does not agree with the Buckley methodology?

A Yes, I think that's been common knowledge in the industry.

Q Isn't it true that none of the leases or agreements between the airlines and the Board contain any provision that the airlines agreed to the Buckley methodology?

A No.

Q That is not true?

A No. There's no—there's nothing in the leases to that effect.

Q That is, there is nothing in the leases to the effect that the airlines agree to the Buckley methodology; right?

A That's right.

Q And there's never been anything to that effect in any of the leases in the past; is that correct?

A That's correct.

Q Isn't it true that no representative of any of the airlines has ever stated to you or to the Board that they agree with the Buckley methodology as implemented at this airport?

[721] A I think I did state that a Mr. Longley had discussed this with me, and he had indicated there were some merits to the methodology.

Q Other than Mr. Longley stating there were some merits, has any representative of any of the airlines ever stated to you or the Board that they agreed with the Buckley methodology as implemented at this airport?

A No.

* * * *

[739] Q Exactly what does the fuel flowage fee cover from the airport's perspective? In other words, what rights does it give?

A I guess it can be interpreted as a landing fee for the local-based aircraft.

* * * *

TRIAL TESTIMONY OF HAROLD PEDERSON

* * * *

[757] Q And specifically the purpose of that particular apron expansion, if it takes place, is to accommodate additional commercial airplanes?

A Yes, to give us additional gate positions so we can handle more aircraft on the ground at the same time.

Q And the particular gate positions are on the other side of an already existing concourse?

A Yes. What we'll be doing is utilizing the concourse so we can serve both the north side and the south side. Right now we're just serving all aircraft on the south side.

Q And that's the right side as you walk out there?

A That's correct. That's where United and USAir is located, and Comair is in the same location. Excuse me, not Comair, but Continental Express.

Q And in your experience at other airports, is it typical to have access to both sides of a concourse in terms of gates?

A Yes, that's a very typical construction. You can still utilize the same corridor to serve gates on both sides, yes.

Q Continue on with the next one, please.

A Number 8 is we feel that probably in the next ten years that we'll probably have to have centerline and touchdown lights on the main instrument runway. What this is is an anticipation that FAA would bring in Category 2 ILS systems. The present—

Q You better describe those.

[758] A Yes. We have an instrument landing system that pilots use to guide themselves in to the runway. At the present time we're at what we call Category 1 ILS, and this gives us minimums of approximately 200-foot ceilings and half-mile visibility, we are available to land at the airport. With the installation of a Category 2 instrument landing system—this equipment, by the way, would be furnished by the FAA, but to make this system effective, you have to have centerline lights down the center of the runway plus touchdown lights, they call it, right in the pavement. And with that system installed, you can reduce the minimums to some 100-foot ceilings and a quarter-mile visibility. So what it would do, it

would give the airport more reliability for getting aircraft in and getting aircraft out.

Q Item 10, Page 2 of that exhibit, would you describe what that entails, please?

A Yes. Under our current master plan study, we are performing a Wildlife Management Program. The reason this study was required is that under our certification we had an inspector as one of his last inspections said that we should do a wildlife management study because we had several reported deer strikes on the airport, and we're supposed to have the study performed so that we can come up with some way or hopefully the study will show ways that we can mitigate that problem of deer strikes and bird strikes. The dollar amount [759] you see in there is what we feel would be an estimate to implement the study when it's complete. We don't know exactly what's going to be involved, but I've heard in talking to all of the people involved with wildlife management that the way you get rid of potential deer strikes is to get rid of the habitat. So this money was in there to try to eliminate some of the swamp areas near the runways and also to cut down about 50 or probably 60 acres of woods to eliminate the habitat.

Q And did the FAA in particular request that the airport consider such an approach or at least look at that type problem?

A They put it on their last inspection that we had to do it. It's part of their inspection report.

Q Item 11-E, would you just briefly indicate what that is?

A Excuse me. What item?

Q Item 11-E.

A Oh, yes. Those are land acquisitions that we feel will be necessary. This Esraugh property is an eight-acre parcel that's now within our clear zone trapezoid to the approach to Runway 26 Left, and we're attempting to negotiate or talk to the gentleman to see if we could buy

that piece of property in fee so we could protect that clear zone.

This Basset property is a piece of property located at the corner of 48th Street and Kraft Avenue, and this particular property is within our 750-foot building [760] restriction line to that main instrument runway on the south side. In fact, that road, the county road is probably within about 500 feet of that runway. We do have a navigation easement over that house, but we just had to trim trees in there in order to meet the FAA standards for side clearance, and we just feel that the piece of property should be bought so that we can create better safety for the airport and get that building back to 750 feet, and this is what the purchase of that property would do.

Q And I take it at this point you're not even in a position to know what the purchase price might be?

A No, we don't. We're just in the discussion stage at this point. And this Weber property is less than a one-acre parcel south of the approach to 26 Left. We had recently purchased property in that area to protect our clear zone and we surrounded this gentleman in his house, and he's requested that we take a look at possibly buying him out rather than leaving him here on that island, so the Board Director indicated he'd get an appraisal. We have an appraisal now and we will probably begin negotiations on that one.

Q And, for instance, would this land acquisition for which you don't today know what the cost might be, be representative of a lot of things you do week in and week out in terms of starting on a project without knowing what the cost might be, but looking into it as you go along?

[761] A That's right. In this particular case we know the benefits, to protect the airport. We don't know the cost at this point, but it's something that has to be looked into.

Q Would you tell the Court what you mean by clear zone and the trapezoid area that you discussed?

A Yeah. That's the area and approach to a runway, and our particular runway there, the instrument runway starts 200 feet off the end of the runway and it's a thousand feet wide, and it goes out 2,500 feet and flares out to 1,750 feet at the end, and that's what they call the clear zone. That's the area that FAA likes to have protected in the best way possible, and the best way possible is to own it in fee. That would restrict people from building in that area so you'd have a clear approach to the airport. That's what a clear zone is.

Q While we're on zones, can you indicate what a noise zone is?

A I'm not really familiar with a noise zone. This is going to come out on this Part 150 Noise Study. This is—I'm going to learn a lot from that noise study myself.

Q Is this the first time the airport's gotten into the sophisticated noise study problem?

A That's correct. When we—this master plan, now it's required on an airport our size. I understand that to do a master plan, that you must do a 150 Noise Study to accompany the development of the airport.

[762] Q You and Mr. Ross and Mr. Nitz all used some numbers that would be something like Part 139, Part 150. Are these all—

A These are—

Q Just a second.

A Excuse me.

Q Are these all parts of the Rule 150 FAA regulations to which you're making reference?

A That's right. I guess it's FAA Part 150, Federal Aviation Administration Part 150. I'm not that familiar with the regulation, but that is the part that noise studies come under.

Q Quickly, would you go through 12 and move on down the page, giving us a description of the status of your files, your work on those particular projects?

A Yes. Number 12, we're grading now for this area along the—excuse me, I take that back. We're talking

here about item number 5 that we covered, draining and drainage along the Runway 8 Left, which I said that we've applied for a grant to do the work. It's our feeling that when that grading is complete, we are running short of space for hangar development and general aircraft parking. We feel there will be a need for 30 aircraft apron parking areas, so this is what that new G.A. ramp is in there, to go in that particular area.

The Aero-Med, I think Mr. Ross alluded to that, and I talk about that in here on the next page, Item 23. This is [763] the roads that would support the construction of a hangar for Aero-Med. That would be a road that would come off what I call our fuel drive to serve that area, and the connecting taxiways are also taxiways that would serve that hangar when it's built.

Q 13, please?

A All this is is a replacement of our airfield maintenance equipment such as mowers, our end loader we use for snow removal, replacement of pickup trucks and other snowplows that are not eligible for federal funding. We have three or four of these type trucks.

Q And this is over a ten-year period of time?

A That's correct.

Q 14, please?

A 14 is just to replace our snowplows and blowers that are eligible for federal funding, and at this time we're eligible for four large snowplows and two blowers which we purchased about three or four years ago, and I feel in the next ten-year period those items will have to be replaced, and that's what this is for.

Q So this assumes that the existing snowplows and blowers may last as long as ten years?

A We assume a ten-year life.

* * * *

[774] Q Am I correct on Exhibit 23 the items the Board has approved are 1-A through 5-B, 7-D—

A You have to go slower, please.

Q I'm sorry. 1-A through 5-B have been approved by the [775] Board; correct?

A 1-A through 5-B, that's correct.

Q I take it 6-C has not been approved by the Board?

A I guess it's been approved by principle, but as far as being approved for construction, no, it has not.

Q And it is an item that is being considered for the master plan; is that correct?

A I understand that is one of the work elements in the master plan that is under study right now.

Q And there has been no environmental hearings, there have been no public hearings as required; is that correct?

A Not to this time, no.

Q The apron expansion, which is 7-D, has that been approved by the Board?

A No, it has not.

Q Is that linked to a project that's already in progress that the Board has approved?

A No.

Q How about the centerline and touchdown, Item 8? Has that been approved by the Board?

A No.

Q I understand that you must do Item 9 and 10; is that correct?

A Yes.

Q Those are required?

[776] A Those are required under federal regulations.

Q And Item 12, I understand that has not been approved by the Board; is that correct?

A That's correct.

Q Item 13, that is a projection again and that's nothing specific; is that correct?

A Well, I guess it's specific to the point that we know we'll have to replace them. But it's not—it has not been approved by the Board, if that's what you're asking me.

Q On the hold rooms, Concourse B, Item 15, there's no Board approval on that; is that correct?

A That's correct.

Q Ticket wing to the east, there is no Board approval?

A That's correct.

Q Do you have any idea of what time period you're thinking of for that, or has anybody even thought about the time period?

A For which item is that?

Q 16.

A Within the next ten years.

Q What's your current parking lot?

A 3,300 cars.

Q I take it—has Item 17 been approved by the Board?

A No, it has not.

Q How about 18-C?

[777] A It has not.

Q I take it you know you're going to replace the shuttle buses at some time within the next ten years; is that correct?

A It's the same as replacement of airfield equipment.

Q Now, am I correct that the Federal Express Freight Building, the Emery Freight Building, and the Aero-Med Hangar, there's no contract and those are projects which the airport will lease with a lease that returns its money plus a profit; is that correct?

A I don't know about the profit part, but they'll be leased to get our money back.

Q I take it Mr. Ross would know that; is that correct?

A Yes, he might know that.

Q And the remaining projects—well, 25-F, has it been approved by the Board?

A It's been approved, but the lease has not been signed with the FAA.

Q And so that is an approved project, and the lease again will return your money with a profit; is that correct?

A I'm not sure about this term "profit." It will return our money, the investment, I believe.

Q How about the remaining projects, 26, 27, 28, 29? Have they been approved by the Board?

A No, they have not.

Q Am I correct that you have done some work with respect to [778] the creation of the rate study?

A I assisted on that.

Q By rate study I mean the last rate study, the one that was done for the three years 1987 through 1989?

A I assisted.

Q And am I correct that you don't know why the rate study separates the public parking passenger terminal cost center from the terminal building?

A I don't—I didn't quite understand that.

Q Am I correct that you don't know why the rate study separates the public parking passenger terminal from the passenger terminal building under the Buckley methodology?

A I just follow it, the methodology.

Q Am I correct if I ask you any other question about the methodology and the rationale behind it, you would tell me you simply follow it; correct?

A That's what I did. I followed Buckley's methodology.

Q Am I correct you have never inquired of anyone why the Buckley methodology refers to break-even, but you get more in the terminal than break-even?

A I've never inquired that.

Q Am I correct that the rate study includes in the runway and taxiway cost center land held for future development?

A You'll have to repeat that again, now.

Q Oh, I'm sorry. I must have spoken too fast. Am I correct [779] that the rate study includes land held for future development in the runway and taxiway cost center?

A That's correct.

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TRIAL TESTIMONY OF DAVID GROENLEER

* * * *

[811] Q Were each of the projects identified in Exhibit DA-29 made necessary because of the development of the Kent County International Airport?

A Yes.

Q Sir, are you familiar with the area that is—the Cascade Township area that is currently occupied by the Kent County International Airport?

A Yes.

Q Were you familiar with it back in 1960?

A Yes.

Q Can you briefly describe what this area was like in 1960?

MR. MALLETTE: Your Honor, may I have a continuing objection on the grounds of relevance to all the questions from now on with respect to this Witness' testimony as to the improvements?

THE COURT: I don't—that wasn't the question, though. I think the question was to describe the area prior to the airport being built.

MR. ALLARD: Yes, the area.

MR. MALLETTE: I'll withdraw the objection.

THE COURT: But your objection may stand as to the [812] nature of these improvements and their cost—not the nature of them, but to the relevancy of the costs of improvements to any base that the airport may be building. Your objection is a standing objection to this Witness' testimony in that regard. Let's continue questioning here.

MR. ALLARD: Thank you, Your Honor.

THE WITNESS: In 1960 this area was rural agricultural.

BY MR. ALLARD:

Q Can you describe to us briefly what Patterson Road was like back in 1960?

A Patterson Avenue between 28th Street and 36th Street was a gravel road, and from 36th Street to 44th Street it was a two-lane blacktop surface treated road, which means it was tar and stone chips placed on it.

Q Are any of the roads identified—excuse me, any of the projects dealing with roads identified in Exhibit DA-29 that type of road at this time?

A No.

Q Sir, are you familiar with the late 1959-early 1960 attempt to locate the Kent County International Airport out in Marne, Michigan?

A Yes. I've lived in Kent County all my life. In fact, I was born and raised in what's now the City of Walker, which is adjacent to Marne, and I recall, you know, vividly that [813] decision process and the public information at the time, that there was an airport choice being selected, and as I recall Marne was one of the prime sources for the airport, as was the present location. Marne was a rural agricultural area at that time, as was Cascade, and Cascade now has the airport and is a booming area and Marne is still rural agricultural.

Q Sir, do you know the total cost, approximately, of these 65 projects identified in DA-29?

A Yes. Added, the total cost to these projects is about \$14.4 million.

Q Was that entire amount incurred by the Kent County Road Commission?

A No. The Road Commission's cost of that 14.4 is approximately 5.4. So there was \$9 million then spent by others.

* * *

[815] Q And is this money that is being utilized for the projects identified in DA-29 money that cannot be used for other projects in the Kent County area?

A Yes. That's where the \$5.4 million would have been obtained from.

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TRIAL TESTIMONY OF DAVID WAICHUM

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[818] Q Sir, do you know the approximate value of the general obligation bonds of September 1 of 1960?

A \$3,975,000 was the issue amount.

* * *

[819] Q I'll try. See if I can do it without as many words. How was the bond issue of September 1 of 1960 to be repaid?

A The county taxpayers at an election approved the issuance of these bonds, and at the same time they also approved an additional levy of four-tenths of a mill for retirement of this debt.

Q When you say an additional levy of four-tenths of a mill, can you please describe briefly for us what that means?

A It's a dedicated millage to be used strictly for retirement of the debt.

Q And from your review of the records, are you able to identify whether or not the purpose of the bonds and the purpose of the election itself was that these bonds would be utilized for the construction of the airport in Cascade Township?

A Yes.

Q Have you reviewed the records of Kent County to determine whether or not there has ever been a repayment by the airport of that dedicated millage?

A To the best of my ability I have reviewed the records of the County, and I can find no evidence of any money coming out of the airport funds being returned to any of the general [820] county moneys.

Q Sir, are you aware of any kind of technical requirement for that money to be repaid by the airport to the County?

MR. MALLETTE: Object, asking for a conclusion again. If there's a technical requirement, it would be set forth in some document.

MR. ALLARD: Your Honor, I'll withdraw the question and ask a different question.

BY MR. ALLARD:

Q In your review of the documents, can you tell me whether or not the money has been repaid? Have you found any document indicating a requirement from the accounting side that that money had been repaid to the County?

A The original resolution passed by the Board indicated that the dedicated millage should be returned to the County from the airport funds.

Q Has the County advanced any other funds for the development of the Kent County International Airport?

[821] A Yes, they have.

Q Can you identify what those funds were and when they were advanced?

A The gross amount of the additional advance was to extend the runway, and the moneys were advanced in 1978 and 1979, in total \$1.2 million, and these were from funds that were under the control of the Board of Commissioners.

Q Sir, do you know the approximate value of the moneys collected pursuant to the dedicated millage that you referred to earlier?

A From my examination of the records, the County turned over to the airport for retirement of the debt 4,332,000-plus dollars.

Q So the total advancement of County funds for the development of Kent County International Airport was approximately \$5,532,000?

A That is correct.

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TRIAL TESTIMONY OF BRIAN PICARDAT

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[847] Q I'm merely going to do some computations, perhaps with your help, as I understand you're a CPA?

A I am not.

Q You are trained in accounting?

A I have a B.S. in accounting, but I'm not a CPA.

Q You're not a CPA, but you have a degree in accounting, you can certainly add; is that correct?

A That's correct.

Q No problem there. All right. What I'd like to do is under the prior rates the cash flow, according to Mr. Dompke's [848] exhibit, was about 2.177 in '88 and 2.4 in '87, and apparently somewhere between. I'm going to say that the average would be \$2.2 million. Now, if you had a cash flow of \$2.2 million, you don't know anything to dispute that, do you? You don't have any information that that number is wrong?

MR. HUNTING: Your Honor, if I might indicate, I guess we could go on for a couple more days with this. This is, number one, beyond the direct examination scope of this Witness; and it would appear to me, number two, completely repetitive of two days of Mr. Dompke or two and a half days of Mr. Dompke, as I recall.

MR. MALLETTTE: If it please the Court, one of the questions that's been raised is—

THE COURT: This is cross-examination. This relates to Exhibit 6 or YY and the question of moneys, interest earned, and I think this goes to the question of incomes made and landing fees. This appears to be one of the Defendant's own witnesses, employees, so cross-examination will be rather wide-ranging on this individual. Let's proceed on.

BY MR. MALLETTTE:

Q If we assume that the airport continues—say it would have continued, say, at the prior rates and it appears the prior rates are generating at about \$2.2 million. If I start writing the years down here, I would have positive cash flow above expenses and debt payment for 1990 at about \$2.2 million [849] if everything stays about the same; is that correct?

MR. HUNTING: I'm going to object, Your Honor. There's absolutely no evidence that the prior rates on a cost recovery basis is generating either the net income or the cash flow figures that Mr. Mallette continues to bandy about, and there hasn't been any testimony to that effect yet.

MR. MALLETTE: Well, they're being generated by the airport.

BY MR. MALLETTE:

Q Let me withdraw it and simply say if you continue to charge out the prior rates to the airlines and everything else stays the same, we're looking for about \$2.2 million in 1990; is that correct?

A I'm not sure. I'd have to do the calculations.

Q What would you have to calculate?

A If I'm going to follow this same format, I would have to take total revenue, operating expenses, debt service interest, and debt service principal to come up with that cash flow. Now, assuming that everything follows the way you're saying it's going to follow, then it makes—that makes the assumption, that gives you your answer. You're assuming your answer already.

Q I'm assuming if you take the last three years, we take an average, we can fairly project ahead. Do you have any reason to believe that's inaccurate?

[850] A What is inaccurate?

Q Projecting ahead based on the last three years. Do you have any reason to believe that's inaccurate?

A Projecting ahead on the last three years, if you're taking everything into consideration in your projections that could happen in those three years, then there's no reason to assume it's not.

Q Let's take a couple things into effect. Isn't it true that the Buckley methodology will adjust the airport income to match inflation because it is based upon a projection of costs for each particular year? Isn't that true?

A I can say that's true it's projected on costs.

Q And isn't it also true that to the extent concession revenues are involved, they take care of inflation because it's a percentage of the revenue of the concession? Isn't that true?

A I could say that the revenue generated at concessions is based on a percentage based on the lease.

Q So let's take through the assumption, which you may or may not agree with, that we're going to have \$2.2 million per year. We're going to project this for 10 years and compare it with the Board's engineer's testimony as to the local cost of possible improvements. So let's take 1991, and I can say \$2.2 million for these years. But isn't something unusual going to happen in 1994, at the end of 1994?

[851] A Excuse me?

Q Something unusual is going to happen at the end of 1994; right?

A I don't know.

Q Well, what's going to happen at the end of 1994 with respect to the airport finances? Let me shorten this to \$2.2 million. I'll just abbreviate. At the end of 1994, what happens to the airport finances?

A I don't understand your question.

Q Well, isn't it true that the bonds are going to be all paid off at end of 1994?

A I would have to double-check to make sure that's what's going to happen, but if you say it is, then I'm assuming that you've looked at it and it says it does. I'd have to look back.

Q Well, let's check for certain. I'll get your financial statement. May we have the last financial statement, audited.

I hand you Exhibit 28 and ask you to review whatever you need in the 1988 financial statements to determine when the bonds will be paid off, and I believe you can do that by looking at the amount remaining to be paid on the bonds which should be in there.

A It looks like they end in '93 is the last year that we pay on them.

Q So '93 is the last year you pay on the bonds, and the bond [852] payments are what, about \$600,000, approximately?

A Bond payments, current amounts are \$490,000.

Q That's principal. What's the interest?

A Principal. I would—I'm not sure. I'd have to check to see what our interest payments have been. But I think \$600,000 sounds pretty close to it.

Q Yes. And to be certain, if you would, take a look at your 1988 statement, and I believe you'll find that the interest is set forth in the operating statement. I hope. Interest expense, 149, so it comes up to what total?

A 150 and 490 is 640.

Q About 640. Say \$600,000. So now we come up, and now that's going to shoot an extra amount to the bottom line under the Buckley methodology. So that's going to be \$2.8 million from then on; is that correct?

A Based on your assumptions, yes.

Q Based on these assumptions, based on the fact that the Buckley methodology will keep things current for inflation; correct?

A I can't say that for sure. I don't know enough about the Buckley study and how that affects inflation and how inflation affects it.

Q Well, isn't it based upon the projected costs for the next year?

A It's based on projected costs. In our Buckley study, it's [853] over three years. It's based on projected costs of the middle year.

Q And it's also, then, as far as concession revenue is concerned, we've established that's linked to inflation because it's a percentage of the concession revenue; right?

A As a percentage of the concession revenue, right.

Q Okay. So now '90 through '94; '90, '91, '92, '93, it's two and a half million for those years. Then '94

through 2000—well, maybe make that 1999, those years it's going to be \$2.8 million a year—sorry. \$2.8 million a year; right?

A On your assumptions, yes.

Q So if we make that assumption and carry it through, can you give us the total? I believe we have, let's see, one, two, three, four years at \$2.2 million?

A That's 8.8.

Q Okay. So I've got \$8.8 million, and how many years at 2.8?

A Looks like six.

Q Let's see. That would be '94, '95, '96, '97, '98, '99, that's six at 2.8. What's the six years at \$2.8 million going to come up to?

A Sixteen point eight. You've got the calculator.

Q Okay. Let's just be sure we're right. Two point eight times six equals—yes, I'm showing you my calculator. I have 16.8.

[854] A That's correct.

Q And then while we've got the calculator, we'll just add 16.8 plus—

A Eight point eight.

Q Eight point eight.

A Twenty-five point six.

Q Should come up to 25.6; correct? So the end of all this, the cash flow above debt service and operating expenses comes up to 25.6; is that correct?

A Based on all these assumptions by adding those numbers, correct.

Q Twenty-five point six. And what assumption should we follow for capital expenditures? That of your engineer, Mr. Pederson? Would that be a reasonable one?

A On what he assumes to be expended out there in the ten-year period?

Q Yes.

A I would make that assumption. That's a pretty—

Q So if everything's purchased, that \$15.5 million; right?

A I can't recall his number, if that's 15.5 or not.

MR. MALLETT: Well, let's see what it is. May we have that exhibit, please.

Your Honor, may I see the court original of DA-23 for a moment just to show it to the Witness so he can see the bottom line? Thank you, Your Honor.

[855] BY MR. MALLETT:

Q I show you the bottom line of the local share projected, and it's \$15,493; isn't that correct, looking at DA-23?

A Yes. I just want to make sure that's the column. Correct.

Q So it's \$15.5 million, approximately; is that correct?

A Correct.

Q So then we're going to come up with \$10 million, is that correct, approximately \$10.1 million cash created by the cash flow in excess of the capital expenditures if these assumptions are true?

A Based on your assumptions and the math, the calculations, then yes, 10.1 is your answer there.

Q Now, isn't it also true that if all the improvements are built, they include things like new parking area, parking garage, those things would increase your revenue, wouldn't they?

A Based on the methodology now, those things would increase revenue because you'd have more space you'd be charging for, yes.

Q And in this computation, based on the prior rates and based on your positive cash flow for the last three years, we haven't taken into account the new improvements generating extra revenue, have we?

A This doesn't take those improvements generating revenue, [856] no.

Q In fact, it would not also put the new improvements into the rate base. They'd go into the rate base, wouldn't they?

A I believe that the Buckley study—again, I'm not sure how the Buckley study—I don't know all of the Buckley study. I've only reviewed it a few times, so I believe they do go in there.

Q And something on the airfield like a new runway would go into the rate base that would be charged to the airlines and the other users of the airfield; is that correct?

A I believe that's how the Buckley method handles it.

Q Do you believe that the results of how this Buckley methodology is likely to work out in the next ten years with respect to capital expenditures indicates that those rates are reasonable or unreasonable? Do you have any opinion on that?

A Do I have an opinion on if the rates in the next ten years will be reasonable or unreasonable?

Q Well, no. Based on our running the results of the rates forward for the next ten years and comparing them to the capital expenditures for that period, that period having been chosen by the airport with respect to the preparation of their exhibit on capital expenditures, do you think this is a reasonable result or an unreasonable result?

A I'm not sure how the reasonableness of the rates reflect how this \$10.1 million comes about.

[857] Q Well, let's look at the \$10.1 million. That's what the cash flow will generate if it continues at \$2.2 million net increase, and of course when your bonds run out, don't you have some other cash on hand now? What's the total cash of the airport, restricted and unrestricted, \$9 million?

A I believe as of December 31, yes.

Q So I'd have to add this \$9 million. I forgot to do that. That would be everything built and \$19 million in cash; is that correct? That's where you're headed?

A Based on all your assumptions, again, all your assumptions, the 10.1 plus 9 is 19.1 million.

Q Now, can you tell me where any of these assumptions are wrong?

A I'd have to look at all these, the reasons and the assumptions behind them. I can't tell you right off the top of my head.

Q We've got your cash flow for the last three years; right? That's correct? You don't have any doubt about that?

A You're saying the average cash flow for the last two years is 2.2.

Q Yeah.

A Based on the numbers you've shown here, it looks like an average is 2.2.

Q And your bonds will run out in 1994; is that correct?

A That's correct.

[858] Q I mean, 1993 is the last year. \$19 million seems to be quite a large amount of money. What would the airport do with \$19 million, having built all these capital assets?

A I'm not sure.

Q Let's assume that you had a more modest situation. May I have a moment, Your Honor, to get another exhibit?

Here's an analysis done by Mr. Dompke, and if you look at cash flow between 1987 and 1988—strike that. Let me start again.

There is something Mr. Dompke did. He's assuming a landing fee of .138 per thousand pounds and a rental rate of \$8.34 for prime space, and he figures the cash flow for 1987 to be \$1.2 million and 1988 to be \$900,000. Now, I know you haven't recomputed that, but based on 1989 being slightly higher, it looks like we're looking at about a million, slightly higher than 19—well, \$200,000 higher than 1988. It looks like we're going to have a cash

flow of a million, a million one under that rate for that three-year period; is that correct?

* * * *

[860] Q Assume that we're asking the Court to impose a rate for 1988, April 1, through the end of 1989, which would produce, say, a million—let's say \$1.1 million. That would be about the average, I think, during that period. It would produce \$1.1 million.

Now, my question is I'd like to calculate whether \$1.1 million per year positive cash flow is sufficient for your capital expenditures. Am I correct that if I take \$1.1 million and multiply it by 10, I will get, what, \$11 million?

A That's correct.

Q And your cash on hand is nine, but assuming there's a refund, let's say it's eight. Okay. That would be \$8 million on hand, \$11 million generated over the next 10 years; right?

A Correct.

Q That's \$19 million; right?

A That's correct.

Q Am I correct that that's substantially larger, again, than the \$15.5 million in capital, in possible capital expenditures; right?

A I will say that's \$3.5 million higher than the 15.5.

Q Can you state any need the airport has for more than \$3.5 million after it's built all the planned capital expenditures?

A I can't make a statement to anything right now.

* * * *

TRIAL TESTIMONY OF JOHN F. BROWN

* * * *

[887] Q In this case there has been discussion regarding what is called a carrying charge. Would you explain that if you can as it relates to the carrying charge in the Buckley methodology as applied at that particular airport?

A I think the best way to approach a definition or an explanation of the carrying charge is to first divide it into two parts, which it's primarily made of up of. Amortization is one part and the periodic maintenance is the second part. Now, let's talk about the first part, which is the amortization.

Q Is that the same as depreciation?

A Depreciation with an interest cost in it. The amortization aspect, first of all, deals with the community's costs in the asset. That is, there is no state aid, there is no federal aid included in the cost. It considers the useful life of the facility, be it 10 years, 20 years, 30 years, whatever it may be. The amortization actually utilizes an assumed interest cost that is appropriate under the time sequence that you're dealing with, and maybe I can make an analogy.

We have a homeowner, a person who I guess would like to be a homeowner and would like to be a landlord, and he goes out and buys a house, and he goes to the bank and he borrows [888] money to buy his house. He will be paying the bank an equal monthly payment which covers his principal, retirement, and his interest costs. That is amortization. If he chooses to make that the cost element in what he's going to render his property to, he's got that part of the rental established.

If he chose to take his money out of his savings rather than out of a bank account—out of a bank loan, then he could use that for the acquiring of the house, and the economic cost aspect says that he's entitled to charge a cost, an interest cost component that would make it equal to what he might have earned on the money had he invested it in some other particular area.

Turning now to the periodic maintenance aspect of it, all that says is that our homeowner knows that he's probably going to have to repaint this house sometime, he knows the septic tank may go bad, he knows that he may have some problems with his house. And so he says, Good prudent management says I should set aside a little

bit each month so that when this particular event occurs, I will have the money available to deal with the particular problem, because it may not be fortuitous for me to go to the bank and borrow that money. It may be that there are other kinds of financial problems that might make it difficult for me to properly perform. So the basic prudent approach is to set aside a little amount of money each month so that he can take care of [889] foreseeable but not actually known and unforeseen kinds of maintenance and repair on it. So that, to me, is the best way to describe the carrying charge.

Q Did you find that this carrying charge in the Buckley methodology, as you have described it, was there from the very first Buckley study in the late 1960s?

A Yes, sir.

Q Can you identify other airports where there are similar carrying charges that are part of the rates and charges package between the airport and the airlines?

A Again, looking at the amortization portion of it, that's not uncommon for the community to use amortization both of the debt or to use amortization of moneys that come from retained earnings, as our homeowner would use his savings on it. So yes, Las Vegas does—

MR. MALLETTE: I'll object, Your Honor. Again, he's now getting into what other airports do, and then we'll have to go back and try the reasonableness of that at every airport starting with Las Vegas. I suppose we'll have to try the slot machines in the concession room.

MR. HUNTING: Your Honor, we're only attempting to show that the concept or the principle that Mr. Mallette's clients are attacking here is in fact used elsewhere. I'm not attempting to break it down in terms of a specific financial component of this versus another. I'm only attempting to show [890] that other airports and in particular the Indianapolis Airport has recognized and used carrying charges in its approach conceptually.

THE COURT: It's my understanding that the methodologies of other airports may be explored into and whether or not they employ various accounting techniques. The question, as I understand it, the Court will not permit is an inquiry as to whether Las Vegas or someone else charges reasonable rates. That's carrying this inquiry much farther than it need be, and that's what the Court addressed itself to in the earlier motion in limine.

So the objection is overruled as it goes to the question of this Witness testifying concerning the methodology of carrying charges at Las Vegas. But as to the ultimate figures in Las Vegas as they relate to something, this Court would clearly sustain any objection.

You may continue. The answer may stand. Next question.

BY MR. HUNTING:

Q Would you identify airports that you know use a carrying charge as part of their methodology similar to that in Buckley?

A Once again making the distinction between amortization and the periodic maintenance aspect of the carrying charge, we've mentioned Las Vegas; Indianapolis you mentioned; and [891] just to cite another one, Des Moines, Iowa, which was an airport brought to the community's attention by the air carriers. But the priority—or the periodic maintenance charge is not a common practice among airports. It's not a bad practice. It certainly is reasonable to provide moneys against contingencies. It may be done in different ways at other airports.

Q Mr. Brown, do you have an opinion based upon your education, your experience, your review of the facts of this case, and your testimony as previously described as to whether the carrying charge in the Buckley methodology as a matter of principle is proper for an airport to use in a rate-making context?

A For Grand Rapids in the way in which it's used, this is the proper method to do it.

Q Did you as part of your study make an effort to compare the Buckley allocations in the past as opposed to the Buckley allocations currently in any regard; and if so, would you describe that?

A Well, I didn't try to do it on a line-by-line basis, but I looked to see how much of the total maintenance and operation expenses would be charged to the terminal facility, to the airfield facility, which was where the cost effect would be for the air carriers. And also when I look at that, when I look at direct operating and maintenance expenses, I can look [892] and see the basis for allocating administrative expenses, and I find that there's not been a great deal of variance over the years as to the total amount of maintenance, operation, administrative expenses that would have been charged to the particular facilities either by the Buckley method or by an appraisal of the current operating results in 1988.

I did not go back and do specific year-by-year studies of actual versus the allocated. But what I did study, I didn't find that it varied significantly, and what the staff did, as I was asked earlier, has been consistently done over all of the time period that the Buckley concept has been in place.

* * * *

[894] Q Do you have an opinion, sir, based on your education, your experience, your review of the facts of this matter as previously testified to, as to whether the historic Buckley cost allocations remained reasonable for use in the Exhibit 6 rate study that's in dispute in this case for the period of time in dispute in this case?

A Yes. I had made a particular appraisal of what the actual results were in 1988 relative to what were produced under the Buckley study to determine just how much would be charged to the airfield, how much would be charged to the terminal building. And under the actual conditions as best the airport can track them, and they don't have a specific cost accounting system in place, but as best they could track them. I found the variance be-

tween Buckley and the actual results to be—to vary, to vary only slightly.

* * *

[896] Q Let me ask you the question again, Mr. Brown. Did you as part of your study attempt to measure the airline revenues in this community by virtue of the sale of tickets and attempt to relate that to the airport charges for the airlines for the privilege to use the airport?

A Yes, sir.

Q And would you indicate what the purpose of that was in [897] terms of the total study that you were hired to perform in this case?

A I wanted to be able to see what the relationship was between revenue generated by the air carrier and the costs that the airport imposed to tap that kind of a market, the revenue market that would be available. And I utilized the data previously discussed as far as I. P. Sharp, DOT, the ATA was concerned. The only revenue I could use was passenger revenue. I didn't have freight or I didn't have mail revenue generated. But utilizing passenger revenue, I found that in 1986 the carriers generated \$133 million at Grand Rapids in air passenger ticket sales; in '87, \$143 million; and in 1988, \$160 million.

Now, that would have translated down into something like this, that the per-passenger—the ticket sale would have been \$135, \$135 and \$143 for 1988; and if I just stay with 1988, the total expenses to the airlines for landing fees, terminal rents and so forth were \$1.70 per passenger, per origin and destination passenger. And so the relationship of the expense to the revenue generated would indicate that it was about 1.2 percent of the total passenger revenue that was realized, and I used the actual figures for 1988. If I used the ordinance rates and charges, I would have had a relationship of approximately 1.5 percent, being the revenues as a percent of the expenses. And again, I don't have freight [898] revenues or mail revenues.

Q Would you look at Exhibits DA-36 and 37 and describe them briefly, if you can, in relation to what you just testified to?

A DA-36 shows graphically the revenues realized per passenger in 1986, '87, and '88, and also shows for the first quarter of 1989 the revenues realized on a per-passenger basis. DA-37 shows that the percent of actual revenues, that is, the revenues as a percent of actual expenses incurred at Grand Rapids, was 1.2 percent, 1.3, 1.2, again utilizing actual—

MR. MALLETT: Object and move to strike, irrelevant. This is like a utility trying to justify its charges by saying the complaining party is a foundry that makes aluminum and the electrical charge is only a small percentage, where the homeowners we charge an electrical charge is only a small percentage of the total cost of the home, and it's meaningless.

MR. HUNTING: Your Honor, we are attempting to show the perspective in which this issue should be addressed. This witness, and I think witnesses before, in fact, I think even the testimony of Mr. Seaman of United Airlines, whose testimony was offered by the Plaintiffs, I believe, also got into this or into similar matters. We're attempting to relate the totality of the airport charges to the totality of the [899] revenues that the airport—excuse me, that the airlines are able to achieve by virtue of serving this particular community and to show in particular the very graphic comparison between the new ordinance rates under attack, which are only 1.5 percent of the ticket price or revenue, as opposed to the range of 1.2, 1.3 and 1.2 percent that was represented by the old or the prior rates as a percentage of the airline ticket.

Mr. Mallette has taken considerable time in attempting to compare the old rates and the new rates with charts for years in which they were not even applicable, and I would suggest that this establishes a very appropriate perspective both in the total sense and in the sense of comparing the old rates versus the new rates when translated as a percentage of the ticket revenue that the airlines are

able to receive by virtue of having the privilege to serve this community.

THE COURT: Well, certainly this is not determinative of the questions the Court has before it. But under a test of relevancy, which is Evidentiary Rule 401, I find it's relevant.

Let's take a short break and then continue.

MR. HUNTING: Could I just offer these and then take a break?

THE COURT: I think there's been an objection to them and I will receive them.

[900] MR. HUNTING: Okay. Thank you.

(Proceedings recessed at 2:35 p.m.; reconvened at 2:55 p.m.)

THE COURT: You may continue.

MR. HUNTING: Thank you.

BY MR. HUNTING:

Q Directing you back, Mr. Brown, to the data contained in Exhibit DA-37, I think either I asked a question that mixed revenues and airport expenses or you gave me an answer that did. But would you clarify for the record in relation to DA-37 the amount that the totality of the airline/airport expenses at the new or the ordinance rates would be a percent of the passenger revenues in Grand Rapids so that that figure can be compared with the figures on DA-37?

A DA-37, for 1988 it should say that 1.2 percent of the airline revenue goes to the costs incurred for terminal rentals, landing fees, and other facility charges at Grand Rapids, and on the actual costs incurred and on the ordinance costs, it would have been 1.5 percent of revenues.

Q So taking 1988 as the central or the full year, the new rates would have been 1.5 percent, whereas the old rates were 1.2 percent of the passenger revenues at the airport?

A That is correct.

Q And again, the data base for that particular information was what?

A The I. P. Sharp data, which in turn is generated [901] originally from the airlines through the ATA and the Department of Transportation.

Q On occasion I think some of your exhibits may use the word "pro forma." Would you explain what you mean by that word in relation to either the new rates or the old rates?

A When I've used "pro forma" in any material submitted, I was referring to the ordinance rates.

Q Or the new rates?

A Correct. Ordinance or new rates.

* * * *

[902] Q You mentioned earlier that you reviewed a Moody's publication in April of 1989. Would you describe that in more detail, sir, so that we can move on to some additional exhibits?

A In April of 1989 Moody's published a report entitled "Rating Airport Revenue Bonds," and it dealt with 56 airports and presented both written statements as to the approach Moody's takes to rating airport revenue bonds in terms of the service, the impact of deregulation, the sponsor of the air service area, and other matters such as that, as well as a series of ratios and revenues from various sources that they looked at.

Q After the Court made its ruling a week ago Monday, did you have occasion to look at some of the Moody's information as it may have related to airport revenues and the breakout or the distribution of different types of airport revenues?

A That is correct.

Q And would you tell me what you did and would you indicate the source of information you found in Moody's, the nature of the information?

A Moody's data I looked at from the standpoint of the information that they presented relative to what percent of revenues came from what sources, such as airlines,

[903] concessions, parking, other. I looked at the operating or what they call a net takedown ratio to see from an overall standpoint how Grand Rapids stood in terms of the net revenues that were generated.

Q And prior to getting to an exhibit, would you identify the other six like-sized airports that you testified to earlier as part of your study before the time we make a comparison of those to Grand Rapids and to Moody's?

A Des Moines, Iowa; Charleston, South Carolina; Colorado Springs, Colorado; Wichita, Kansas; Spokane, Washington; Midland, Texas.

Q Were you, in choosing those airports, at all concerned about the methodology that may have been either embodied in the lease at those airports between airports and airlines or reflected in the practice by which rates, fees and charges were made?

A No. I was interested in what made up the revenue dollar at those airports, to look at it relative to what made up the revenue dollar at Grand Rapids.

Q And were you able to obtain information regarding the operating revenues, the interest income, the total revenues, the operating expenses, and the net revenues of those six airports you described?

A Yes.

Q Would you indicate how you obtained that information?

[904] A Well, I got it both from audit reports and statements prepared by the community as well as data presented; not data presented in the Moody's report, because I didn't take the six airports out of the Moody's report. I looked at the 56 and in a sense just said from the total standpoint, if I took all of the United States, because they're very large, very small, all different kinds, sizes and shapes of airports, of the 56 airports, how would Grand Rapids look, how would their revenue dollar look relative to the other airports. I also did that for the six airports.

Q Did you obtain 1988 financial statements or reports from each of those six airports?

A Yes, I did.

Q And did you then work with that information, and if so, would you indicate what you did in attempting to develop the net takedown ratio for those six airports?

A For the net takedown ratio—and it might be well to identify what Moody's calls a net takedown ratio. They take the operating revenue, the interest income and call it the total revenue. From that they subtract the operating expenses, and that figure is net takedown. It's a figure they're particularly concerned with relative to the moneys that would be available to pay principal and interest on airport revenue bonds. So looking at Moody's and at the six airports, I did, A, took Moody's as Moody's reported it; and [905] B, took the six airports and computed it on the same basis Moody's had, Moody's had done, excuse me.

* * * *

Q Did the net takedown ratio or analysis also appear in the Apogee Public Research Report attached to court papers in this particular proceeding more than a year ago?

[906] A Yes, sir.

Q And is this a ratio or an analysis that you have become familiar with over the years that you may have been doing airport work?

A Yes, sir.

Q Is it an analysis that, so far as you know, Moody's has accomplished on previous occasions when they may have been rating airports?

A Moody's is very strong on the use of this ratio.

Q Can you indicate, sir, the most well-known rating agencies as it relates to the creditworthiness of public entities?

A Well, the two would be Moody's and Standard & Poor, and I didn't mean to slight Standard & Poor. Standard & Poor certainly looks at a net takedown ratio

also as far as the ability of the airport to generate revenues, control expenses.

Q And did you undertake this particular study after you learned of the ruling of the Court a week ago Monday as it related to evidence of comparable airports that might be permissible from a revenue point of view as opposed to the ruling that indicated that some comparable airport cost data might not be admissible?

A Yes, sir.

Q And in particular did you then take this particular ratio and apply it to Grand Rapids and to each of the six like-sized airports that you described that were chosen on an origin and [907] destination basis?

A I did that in addition to looking at the distribution of the revenue dollar, which I understand the Court was interested in as far as the sources such as parking, rental car, concessions, airlines, others that make up the total revenue.

Q Did you find in your experience that typically airports would have some similarity in the range of concession activities and the types of revenue sources that airports have?

A Particularly when you deal with six airports that are of comparable size, like size.

Q Explain what you did in terms of comparing those six airports to Grand Rapids, dealing first with the statistics that you collected before we deal with the graphic presentation, sir.

A Well, I computed the net takedown for each of the six airports on the same basis that Moody's computed theirs so that also I would have it for the Moody's report which had 56 airports involved.

Q And did you likewise do that for Grand Rapids?

A Yes, sir.

Q And was that done for Grand Rapids both on the old rates and/or on the so-called new or ordinance rates?

A Yes, sir.

[908] Q Would you indicate the results of that work reflected as a percentage of total revenues for those six airports and Grand Rapids?

MR. MALLETTE: I'll object on the grounds that the testimony is that the proposed computation computes the amount that would be available to pay debt service but does not consider as to whether there's any debt service to pay, and there's no way of determining whether or not the six airports, for example, are like Grand Rapids with almost no debt service so that the entire takedown goes to the bottom line or otherwise.

THE COURT: But doesn't that go to the weight, though, to be given to the testimony at a particular airport?

MR. MALLETTE: I would think at that point, since he's testified he didn't take—the debt service is not shown. I would think it would also be irrelevant.

THE COURT: But the debt service would be part of the operating expenses, wouldn't it?

MR. MALLETTE: No. The operating expenses do not include debt service. I believe he testified that the takedown is interest income plus operating revenue, that the operating expenses—that that is the amount available for debt service. I think that was his testimony.

THE COURT: Well, it seems—response, Mr. Hunting?

MR. HUNTING: I hate to be guilty of putting one of [909] Mr. Mallette's charts up on the easel, but it's very clear that Mr. Mallette has chosen to reflect some of the same factors in a way that he believes assists his case. We are attempting to frankly take some of the same factors and to compare them, especially since the witnesses of the airlines, without comparing to other airports, have reached conclusions regarding the alleged excess of positive cash flow, the alleged excess of net income, the alleged surplus that results in a number of years. We are attempting to show specifically that the airport here in Grand Rapids falls very much in the mean or the pattern of other similar airports throughout the country as it

relates to these matters and as it relates to the so-called distribution of the revenue pie of dollars.

THE COURT: And built into that is, of course, the interest expense?

MR. HUNTING: Yes.

THE COURT: Overruled. We'll take the answer. You may continue, sir.

BY MR. HUNTING:

Q Would you please give the name of the airport and then the percentage that you found prior to the time that I sponsor an exhibit that has all of those details in it, so that we're just dealing with the name of the airport at this point and the official report and the percentage prior to the time I offer an exhibit, Mr. Brown?

[910] A And are you identifying percentage as the net takedown percentage?

Q Yes.

A 1988 for Des Moines, 50.2 percent; Charleston, 62.7 percent; Colorado Springs, 61.3 percent; Grand Rapids utilizing the present rates, 42.7; Grand Rapids utilizing the ordinance rates, 47.3; Wichita, 21.7; Spokane, 32.3; Midland, 39.1. The mean of those without Grand Rapids included, 44.55.

Q And was there a median calculation, too?

A The median would have been 44.65.

Q So realistically there's no statistical difference between the mean and the median in this regard; am I correct?

A I don't believe so.

Q Did you then reflect the information and the additional columns in a bar chart to which has been attached the data from these airports that you read?

A I believe so, sir. Yes, sir, I'm sorry.

Q And I will show you what has been marked DA-42, and if you'll wait a minute while I distribute that, I'll have a question for you.

Is Exhibit DA-42 the graphic presentation of the work you described and the columns of information that you

described, and have you attached to DA-42 an information sheet that was the basis of DA-42?

A That is correct.

[911] Q And in particular, would you describe what the vertical columns in the bar chart mean in DA-42, and again indicate the source of the information for DA-42, starting from left to right?

A From left to right, the like-sized airports, of which there were six, are reflected in the information set forth in the attached table and are based upon the mean of those six airports. Grand Rapids is Grand Rapids based upon the ordinance rates.

Q So the middle column?

A The middle column, excuse me.

Q Is Grand Rapids at the new rates rather than Grand Rapids at the old rates; am I correct?

A Correct. And the third and last column was Moody's and their 56 airports, the mean of those 56.

* * * *

[913] BY MR. HUNTING:

Q Does the Moody's article reflect the status of the community in which an airport exists as it may relate to the bond rating for that airport?

A Moody's in their special report on rating airport revenue [914] bonds cites the importance of the air service area as one of the key factors to look at as far as the rating of the creditworthiness of bonds, airport revenue bonds.

Q And has that been consistent with your practice and experience with airports, and in particular, with the bond rating of airports and the attempts of airports to obtain financing?

A I've worked extremely long and extremely hard to get the rating agencies to understand over time that it's the community that generates the air passenger, not the airline. You may change the tail and the colorings of the airplane, but it is the people, they are the people who generate the passengers.

And finally, both Standard & Poor and Moody's have basically come around to saying it isn't a long-term agreement that protects the widows and orphans; it is the strength of the community and its ability to generate air passengers that will be their ultimate protection, and obviously, prudent management of the airport.

Q Did you also make any comparison of the net take-down ratio or analysis within the confines of just the Kent County International Airport by comparing previous years to any current years in issue?

A Yes. I looked at it over a fairly long term or over the ten-year period, 1979 through 1988.

[915] Q Do you have those figures available?

A Yes, sir.

Q Would you read those into the record for that period of time, giving the calendar year and figure, please?

A 1979, 49.6 percent; 1980, 47.1 percent; 1981, 39.1 percent; 1982, 44.7 percent; 1983, 49.0 percent; 1984, 50.3 percent; 1985, 52.9 percent; 1986, 49.5 percent; 48—I'm sorry, 1987, 48.8 percent; and 1988, 42.7 percent.

Q And in your experience, for that ten-year period of time, is that a reasonably consistent analysis or ratio for that period of time?

A Very consistent, very balanced, no wide fluctuations.

Q Mr. Brown, do you have an opinion based upon your education, your experience, your review of the facts of this case, your study as you just indicated it with reference to the information in Moody's and DA-42, as to whether the operating net income of the airport is reasonable when compared to the six other airports in DA-42 and when compared to the industry data in Moody's as also reflected in DA-42?

A The mean of both Moody's and the six airports and of Grand Rapids is very, very close.

Q Directing your attention to the landing fee in this case, would you describe the components of the landing fee as historically used by the Kent County International Airport?

A The components of the landing fee relating to facilities [916] would be the airfield and the airline terminal apron, aircraft parking apron.

Q And would you describe the components of the landing fee as it relates to the factors of weight and frequency as it has been used at the Kent County International Airport?

A Grand Rapids determines the total cost properly assignable to the airfield, and it then distributes this cost between the users half on the basis of the weight landed by the users and half on the basis of the number of aircraft operations, landings and takeoffs of the users, or takeoffs of the users.

Q Without getting into the specific monetary amounts of landing fees at other airports per 1,000 pounds of certified aircraft weight, can you tell me based upon your experience the other ways in which airports that you're familiar with approach the landing fee components as it relates to the weight factor and the frequency factor?

A Generally speaking, the airport will use just a weight factor. If an operations factor is in, it's relatively small. But by and large, it's primarily a hundred percent weight or what we call weight/frequency, weight of the aircraft times the landings of the aircraft.

Q And what have you come to learn is the component portion of the Kent County International Airport landing fee in that regard?

A Well, that they're using 50 percent of the cost allocated [917] on the basis of operations and 50 percent allocated on the basis of weight.

Q How does that particular 50 percent allocation impact the air carriers versus general aviation in terms of the breakout of landing fee for commercial airlines?

A Well, if I could answer it this way, it's, I think, quite generous for the air carriers because a more signifi-

cant proportion of the total costs assignable to the airfield are allocated to the general aviation users than you would find at other airports where it was done on a weight/frequency basis. And so the total weight of the air carrier portion of the airfield probably will run 80, 85, 90 percent of the total weight landed at the airport.

Q And I take it that's because the commercial air carrier planes are many times heavier than the typical commercial—excuse me, than the typical general aviation plane?

A Yes, sir.

Q Are you able to compare that situation as it relates to the cost allocation in the Buckley rate study between general aviation and the commercial airlines, in particular regarding the landing fee?

A Well, there's a fairly substantial portion of the airfield costs that the air carriers don't have to bear, since that is a—that is the methodology used under the Buckley system to distribute the costs.

[918] Q If, for instance—I think we determined through other witnesses that Indianapolis had used a 90 percent weight factor and a 10 percent frequency factor. If that were to be applied in Grand Rapids rather than the 50 percent/50 percent, roughly what would happen to the general aviation cost allocation under Buckley if that type of change were to have been made?

A Well, it would be much less; much, much lesser amount of the total dollars being allocated to the general aviation activity.

Q Would you indicate your experience at other airports as it relates to the handling of general aviation fuel sales and other income from general aviation and compare it to your familiarity with this airport?

A Well, it's not uncommon for airports that utilize a compensatory cost of service rate concept to determine the costs properly assignable to the airfield, to credit revenues received from the fuel sales and the balance picked up by the carriers a hundred percent and distribute it among them on the weight basis that they have incurred or they have produced.

Q Apart from the dollars that might be involved in other airports, in that regard, are there so-called compensatory or cost of service methodologies that may treat general aviation in that fashion at other airports in your experience?

A Yes, sir.

[919] Q Have you, when you have traveled to the Kent County International Airport, had occasion to notice the roped off or the stanchioned area in front of the airline ticket counters in the front part of the terminal building?

A Yes, sir.

Q And from your experience and review of the materials in this particular case, including the Buckley study, are the airlines charged for that space that may be stanchioned off or roped off where passengers and other people may line up or queue up prior to the time they can get their ticket and check their luggage?

A No, they do not pay for that space.

Q Are there other airports, without getting into the financial terminal rental rates, where the airlines are charged for an entire concourse area?

A Phoenix, Arizona, again a case in point. Since security became so strict and the airlines were restricting the utilization of the concourse to only air passengers, the community decided to make a hundred percent of the concourse airline space and call it revenue producing.

Q Directing your attention back to the details of the Kent County International Airport, would you indicate the extent to which you studied the airline costs at this airport as a percentage of the total airport expenses dealing only with the Kent County International Airport in that comparison?

[920] A Yes, sir.

Q You can refer to—apparently you have a chart of some sort in front of you?

A Yes, sir.

Q Would you refer to that information, describe it first and then read that into the record, if you will, please.

A Well, I was interested in seeing how much of the total airport costs were being borne by the airlines. So I took the total operating expenses, local depreciation, total expenses, and related it to the airline costs, meaning landing fees, terminal rentals, apron overnight charges, and I ran the comparison from 1979 through 1988. In 1979 the airlines' share of those costs were 43.7 percent; 1980, 48.0; 39.2 in 1981; 45.0 in 1982; 56.4 in 1983; 53.4 in 1984; 50.7 in 1985; 44.8 in 1986; 43.3 in 1987; and 40.6 percent in 1988.

Q Again, would you indicate what factor was a percent of what other factor for the figures you just gave?

A I computed the airline costs based upon their payments for landing fees, terminal rentals, apron use charges, to the total cost of maintaining and operating the airport and expressed that as a percentage that the airline was of the total.

Q And what conclusions did you draw from that study and those series of figures, sir?

A I find no basis to say that airport rates and charges have [921] been increased significantly as a portion of total airport costs. They have maintained constant, or in the last five years actually decreased.

Q And I take it that for purposes of those percentages, so we can have the record accurate, those were actual costs incurred under the so-called old rates?

A Correct.

Q Just to clarify, each of the years for which you read, that would have been calculated based upon whatever landing fees, terminal rental rates and overnight airport parking fees would have been in existence at the time in the years you described?

A Money actually paid to the community.

Q Based on your work over the years, would you describe the importance you attribute to the economic or other base of a community as it relates to airport traffic in that community?

A Well, I think I said before that I worked long and hard to get the rating agencies to understand that the economic base for air transportation provided by the community is what generates air passengers. In addition, I participated in several Civil Aeronautics Board proceedings when they were still making judgments as to what service could be provided, what certificates of public convenience and necessity could be awarded, and that was always a key consideration to present to a hearing examiner as far as justifying additional air [922] service, either in terms of competitive air service or service where none had existed before.

Q And in what context would this occur?

A In the context before the Civil Aeronautics Board?

Q Yes.

A Would be route proceedings that were being held to consider whether additional service should be provided in the form of competitive service or service where none had existed before.

Q In the context before deregulation, were there times when the airport was attempting to attract additional airline service into the community?

A There were periods before deregulation and since deregulation that still goes on that communities were—some communities worked very hard to convince the air carriers to improve expanded air service to their community.

* * * *

[923] Q Can you describe the infrastructure or the aspects of a community that, in your opinion and in your experience, relate to matters regarding the scheduling of airline traffic into a community?

A Well, if I understand the question correctly, certainly the population of the community, the population growth of the community; the ability of that population to buy transportation, meaning the average personal income of the community. Many years ago the FAA did studies that—it actually is their predecessor, but call it

the FAA, studies classifying communities as institutional, marketing, balanced industrial, and they were able to ascertain and to put forth the argument that an institutional community developed much more air traffic per 10,000 population than another balanced or marketing or other type community.

Institutional might be a Miami, a Las Vegas, a Washington, D.C. A marketing type community such as Chicago or Dallas would develop less than an institutional, but more than the others. Balanced would—and a marketing—excuse me. A balanced would be like Cincinnati, Ohio, and it was not on the high side nor on the low side, and that an industrial community developed the least amount of passengers per 10,000 [924] population, and that would be a Pittsburgh, strictly manufacturing, maybe a Detroit. So yes, the economic base, and portions of it were important considerations as far as judging air service, air service potential, air service growth, air traffic growth.

Q And have you actually attended governmental hearings prior to deregulation where these considerations and these factors were actually discussed and taken into account in either the increasing of airline traffic into a community or the decreasing of airline traffic into a community?

A I participated in them as representing the community's interests at times as an airport management consultant.

Q And specifically, what are some of the aspects of the infrastructure of a community, other than its population, that may be important in making it a community that can attract travelers to the community?

A Well, certainly a community that has a school system that one wants one's children to be in; certainly a community that is low in crime rate, high in good police security; a community with libraries, art museums, cultural opportunities; good fire protection. The things that

go to make for a good community provided in terms of parks, streets and sewers, things of that nature.

* * * *

[Q] [925] What particular finding did you make as to this airport regarding its hub or its non-hub status?

A Well, this airport ranked 81st among the airports of the United States, and it's classified by the Federal Aviation Administration as a small hub, meaning less than twenty-five hundredths of one percent of the total enplanements of the United States occur there. We have small hubs, we have medium hubs, we have large hubs, and in fact some that are non-hubs, and I need to make the distinction. I spoke earlier about hubbing in the sense of a significant volume of connecting passengers, and in this sense we're talking now about a federal government classification that simply relates it to total domestic enplaned passengers.

Q Now, did you take note of any of the so-called market entries or exits of major airlines during the period of time in question here?

A I didn't find any of the major airlines that had left this airport. There had been some changing back and forth of the commuters, and I think it was interesting to note that Delta Airlines has announced it will initiate service on the 2nd of March, 1990.

Q And does Delta have a hub somewhere?

[926] A In Cincinnati, Ohio; Atlanta; as well as Salt Lake City and some other places.

Q Directing your attention again, you mentioned earlier the value of the airline revenue market. Would you compare that statistically in terms of the growth of the airline ticket revenues in this community from 1986 to 1988 versus the rate of inflation for that same period of time?

A We found that the local market for air passenger revenues, air passenger ticket revenues had grown 19.4 percent during that period while the CPI, the Consumer Price Index, had grown 7.9 percent.

Q And again, what were the volumes of the dollar revenues for this market as to total ticket prices for those three years, '86, '87 and '88?

A Rounding the numbers, it would be \$134 million the air carriers realized in passenger ticket sales in 1986, \$144 million in 1987, and \$160 million in 1988.

Q Did you then make an effort to quantify the difference between the old and new rates in their totality when compared to the 1988 total dollar volume of ticket sales in the community encompassing this airport?

A I looked at that, and it indicated that probably is less than one percent of the value of the market that would have been represented in the increased costs versus the actual rate if the ordinance rates were in place versus the actual rates, [927] or \$576,000.

Q Did you continue on with the preparation of any other charts and data with reference to the operating revenue at the six other airports that you described?

A Well, once again, I wanted, as I understood, to provide something that could be reviewed here in court regarding the size of the revenue sources at these other airports, and I looked at parking, automobile parking, rental car revenue, other concessions, airline revenue, and other revenue at Grand Rapids, as well as at the six like-sized airports.

Q Did you follow the same format as you described earlier in your retrieving of information as to these airports from their financial statements?

A Yes, sir.

Q And did you, as before, attach to what I have now had marked as DA-43 an information sheet to support what is depicted graphically in DA-43?

A Yes, sir.

Q And would you describe what DA-43 depicts, and in an effort to move this along quicker, would you indicate why you prepared DA-43, taking into account that the detailed data is attached as a second page to DA-43?

A I think it shows very clearly, graphically, that Grand Rapids is very, very similar to these other like-sized cities in terms of their generation of revenue, whether it be from [928] concessions or rental cars or other concessions or from the airlines or from other revenue sources.

Q And I take it the six like-sized airports are the same that we discussed earlier?

A Yes, sir.

Q And is this an effort, then, to relate the different segments or pieces of the pie that would be represented by the total airport revenue at these six airports and at the Kent County International Airport?

A The mean of those six airports, yes.

Q And in particular, was DA-43 prepared utilizing the new or the ordinance rates for the Kent County International Airport?

A Yes, sir. It is indicated under Grand Rapids in the box at the bottom of the graph in parenthetical expression, "Ord Rate", meaning ordinance rates.

Q And the source of this information was from the financial statements of the six airports and, I would assume, from the financial statements and records of this airport?

A Yes, sir.

Q What conclusions did you draw from the information attached to DA-43 and from the graphic presentations of DA-43 as it relates to the revenues of this particular airport?

A We're certainly not dealing with an airport that generates parking revenues or rental car revenues relative to total revenues or airline revenues that are significantly different [929] than the revenues that are generated at other airports of a like size.

Q Would this coincide with your airport experience in terms of concession types of activities and revenues generated therefrom?

A Yes, it would, and it doesn't really surprise me because the kind of agreements written based upon rental

cars or based upon parking, if that is out for a concession, are not significantly different until you get to very large airports or communities, and sometimes then aren't that much different.

MR. HUNTING: We would like to offer DA-43 at this time, Your Honor.

MR. MALLETTE: No objection.

THE COURT: Received.

BY MR. HUNTING:

Q Would you continue on, Mr. Brown, with your findings as it relates to this airport and compare, if you will, the typical expense structure of this airport versus other similar airports; not in specific dollars, but in the types of expense categories?

A Again, I found that very similar to what one would find at another airport of a like size. The salaries and wages component, the supplies and materials component, an outside services component, there is nothing that I found unusual at Grand Rapids from that standpoint.

[930] Q Did you come to learn anything about the grant assurance as it relates to this airport and FAA funds provided in recent years for which there were such assurances; and if so, what did you learn?

A Yes, sir. The grant assurance has three particular things that one would be interested in in this particular setting. Number one, did the revenue stay on the airport. There's a grant assurance requirement that the revenue stay on the airport, and I found no basis and no evidence that moneys went off the airport other than that were allowable under the grant to pay for reasonable services provided by the community. I didn't find that the FAA had challenged the reasonable rate and charge provisions of the grant assurances, and I didn't find any indication that the FAA had challenged the unjust discrimination provision of the grant assurances.

Q And would you explain from your perspective, utilizing your experience, what the unjust discrimination

portion of the grant assurances are, the application or relationship of that particular grant assurance as it might relate to any issues in this case?

A It may be more a legal question than a general management question, but I take it to be unjust discrimination if it's between users of a like category, and if the question is general aviation versus commercial, scheduled air carriers, there isn't discrimination since they are not competing [931] against the scheduled air carriers as a significant source of traffic diversion for them. So that would be my layman's interpretation.

Q Did you find any indication in any materials that you have reviewed that the FAA challenged or investigated any factual issue you understand to be in dispute in this case?

A No, sir.

Q Did you have occasion to continue your study as it related to airport revenues on an enplaned passenger basis, and would you describe what you did, attempting, if you can, to borrow upon any similarities that you've already described for the other charts?

A Well, I put it on a per passenger basis to look at it from a slightly different perspective. I looked at parking, automobile parking revenue, rent-a-car revenue, other concessions, airline, other, and total. And without burdening the record as to all of the figures, what I found was that, for example, Grand Rapids developed \$2.53 per passenger from parking, and the mean of the six airports developed \$2.04. The rent-a-car revenues were \$1.30 at Grand Rapids and \$1.26 at the mean of those airports, probably indicating, again, markets that are comparable sized and agreements that were quite similar. Other concessions was \$1.30 at Grand Rapids and \$.89 at—that is the mean of the others. Airlines were \$4.33 at Grand Rapids; \$4.15 at the mean of the six. Other [932] revenues, \$1.53 at Grand Rapids; \$2.42 at the mean of the others. And for total revenues on a total per passenger basis, \$10.92 at Grand Rapids, \$10.76 at the other air-

ports; again perhaps underscoring the reasonableness of my looking at these other airports, these particular six.

* * * *

[934] BY MR. HUNTING:

Q Continuing on now, Mr. Brown, would you indicate how the Buckley methodology principles relate to the principles of any other rate-making methodologies with which you have been familiar or that you have created or implemented?

A The Buckley or compensatory or cost of service concept of airport/airline rates and charges as utilized at Grand Rapids is very, very similar to that which I developed as early as 1952 and utilized at several airports in the United States. So I don't find it new, unique.

Q And are there other airports, in your experience, that today operate under a Buckley type or a cost of service type or a compensatory type methodology as it relates to the [935] establishment of landing fees, terminal rental rates, and other charges between airports and airlines?

MR. MALLETTE: I'll object. That's a compound question. It asks three questions. The Buckley methodology is used here.

MR. HUNTING: I'll break it up.

BY MR. HUNTING:

Q In your opinion, is the Buckley methodology a compensatory type methodology?

A Yes, sir.

Q In your opinion, is the Buckley methodology a cost of service methodology?

A Yes, sir.

Q In your opinion, is the compensatory methodology also known as a cost of service methodology?

A Yes, sir.

Q Are there today, in your experience, airports utilizing compensatory or cost of service methodologies to establish the charges between airports and airlines?

A Yes, sir.

Q And are the Buckley principles to some extent also existent in those other compensatory or cost of service methodologies based upon your actual experience?

A Yes, sir, because the essence of the compensatory cost of service Buckley approach is the establishment of cost centers, [936] functional areas on the airport. There are cost definitions, there are cost accounting or cost allocations to those particular functional areas, and the utilization of the particular functional area provides a basis for the distribution of those costs between the users of the particular functional area.

Q Did you find any indication that costs had not been incurred as reported?

A No, I have not.

Q Did you find any indication that costs were improperly incurred by this airport for non-airport purposes?

A No, I did not.

Q Did you find indications that costs in the past have been imprudently incurred by this airport?

A Well, I haven't heard of any charges of imprudent utilization or incurring of costs at the airport.

Q In an effort to simplify this, I take it you have attended hearings before the State or FAA where projects were being discussed or approved?

A Would you define projects?

Q The types of contracts that might become part of a rate base. Let me ask it in a different way. It was perhaps a clumsy question.

Are you familiar with the way in which costs are developed by virtue of projects before they become part of the [937] cost base?

A Are we speaking now of capital costs?

Q Yes.

A For—

Q Let's take a particular project. Are you familiar with the way in which a project might evolve from its first ideation, if you will, and the time that it may become part of the cost base?

A Well, I've been involved in discussions regarding the feasibility and/or desirability of particular capital programs, particular capital cost assets as to whether or not appropriate for the community to engage in.

Q And I take it you're aware that in some of these instances projects, when approved, implemented and paid for, can have useful life of anywhere from 10 to 30 years?

A Yes, sir.

Q Is that standard for airports in terms of the different types of projects airports might have apart from the monetary amount of the projects?

A The depreciation periods vary from 10 years, 20 years, 30 years, yes.

Q Did you find any substantial variation in the depreciation periods in Buckley versus other cost of service or compensatory methodologies with which you are familiar?

A Not significantly, no.

[938] Q Did you study the rates, fees and charges on a per passenger basis as it relates to only Grand Rapids?

A Yes, sir.

Q And would you pull whatever tabulation or information you may have and indicate for the record those statistics that relate only to Grand Rapids on a per passenger basis dealing with the old rates and the new or the ordinance rates?

A When you speak of the costs that are—that were pulled, we're talking about the costs that became airport—airline costs?

Q Yes.

A Yes, I did, and I studied it over a particular period from 1980 through 1988.

Q And would you indicate the results of that particular study?

A Well, to translate it down into something a little more easy for me to understand, I put it on a cost per passenger basis, so that I said the airlines' cost per passenger over that time period of 1980 through 1988 ranged from \$1.40 in 1980 to \$1.70 in 1988 with a high in 1983 of \$1.90 per origin and destination passenger.

Q And were those figures adjusted to any extent for inflation?

A No, sir.

Q Did you then take those per passenger cost figures at [939] Grand Rapids and compare them to any inflation rate for the same period of time?

A Well, I did look at the high point in 1988—or 1983 relative to 1988 and found that the cost increase at Grand Rapids on a per passenger basis was 15.3 percent, and during this same period the Consumer Price Index increased 18.8 percent, which indicated that apparently reasonably prudent management was being followed.

Q And did you use the new or ordinance rates for 1988 in that comparison of the old rates?

A Well, I'm looking at the actual cost to the passenger, not to the ordinance rate.

Q So that looking only at actual cost per passenger—

A To the airline.

Q To the airline.

A Excuse me.

Q The increase from 1983 to 1988 was less than the inflation increase for the same period of time?

A That's correct. I'm sorry. I would like to correct the record. I was looking at two documents. The hour is late. The comparison between 1983 and 1988 is based on the ordinance rate, not on the actual rate, and the percentage relationship of increase was 15.3 percent for Grand Rapids and 18.8 percent for the Consumer Price Index.

Q And would you give the raw figures in the record just so [940] that that will reflect it for those periods of time?

A They were \$1.90 per origin and destination passenger in 1983 and \$2.19 per passenger in 1988, using the ordinance rates.

Q Making that comparison, what was the percentage increment for that period of time from 1983 to '88?

A 15.3 percent.

Q And the inflation CPI for the same period of time was what?

A 18.8 percent.

Q So that even with the new rate comparison, it would be less than the CPI or inflation rate for that period of time, '83 to '88?

A Yes, sir.

Q Did you analyze any of the information regarding airlines that came in or left this airport in recent years for purposes of your study?

A Other than simply to note that there had been no significant departure of major airlines from the community, and also to note that Delta Airlines is scheduled to commence service in March of this year.

Q And what significance, if any, did you attribute to that information, sir?

A Well, I would say that certainly the airport/airline rates and charges were not such as to cause the carriers to leave [941] the market, particularly a market of that size, nor prohibiting or preventing Delta from coming into the market.

Q Sir, do you have an opinion based upon your education, your experience, your review of the facts, files, documents, and studies you've taken into account in this case as previously described, as to whether the new or the ordinance landing fees, overnight aircraft parking fees, and terminal rental rates under the Buckley approach are reasonable?

A In my judgment, they are reasonable.

Q And would you provide some brief summary for that conclusion, sir, recognizing that it's unfortunately taken me quite awhile to get you to this point?

A First of all, we are dealing with costs that were actually incurred. We are dealing with costs that have not been challenged as being imprudent costs. We are dealing with a reasonable and consistent basis for allocating these costs to functional users. We are dealing with a basis which is not foreign to the airport industry and to the airlines within that industry for allocating those costs to the users in the forms of rates and charges.

I believe also that an independent check was made in the sense that FAA has found no reason to challenge the airport's rates and charges either for reasonableness, unjust discrimination, or for the purpose of any money going off the airport. And with all due respect, I had to look at other [942] airports to see how they were doing both in terms of costs, also in terms of revenues, in terms of net takedown ratios, and I find in support of my conclusion that Grand Rapids is right square in the middle of the other airports and the airport industry, and one might characterize it as an all-American city.

Q And I take it, sir, if you find the new or the ordinance landing fees, rental rates, and overnight aircraft parking fees to be reasonable, that for the same period of time you likewise find the old or the prior rates to be reasonable?

A Yes, sir.

* * * *

[949] Q That's not the question. The question is if you take the law as it is now, the projections are correct if we use the locally funded portion, the amount determined by the engineer for the airport; is that correct?

A I will agree that if you have that amount of money and you are acquiring or accumulating additional moneys, you will have the moneys available at some level to take care of future capital requirements.

Q And to put many more million in the money max, right, at the prior rates?

A Depending upon what criteria and what assumptions you make for your forecast based upon your illustration this morning, there would be significantly more money in there, but it did not come from the air carriers.

Q By the way, isn't it true that the Board subsidized the costs in the airfield not paid by general aviation by using funds from the concession income?

A I don't know that I like the term "subsidize." The basic concept of establishing the distribution of costs relative to general aviation and the airlines was to be certain that the airlines weren't burdened by the cost of general aviation. Now, the community has chosen not to assess general aviation at a rate that might be equal to the amount of costs assigned in the airfield on it, and the revenues that would have been [950] realized there are being realized from concession activities.

Q And so isn't it true, then, that the concession revenue, in effect, pays for the general aviation use of the airfield? They have to have the money from somewhere, and that's where it comes from?

A Based upon the allocation that is utilized there on it, the costs that the system had developed relative to the revenues received indicate there is a shortfall.

Q And isn't it true that that comes from the concession revenue which is derived, directly or indirectly, from the airline passengers?

A Yes.

* * * *

[952] Q Am I correct that airports have compensatory systems of rate-making, but that doesn't necessarily mean they have a Buckley system; they could have some other sort of [953] compensatory system?

A I've tried to characterize the Buckley system in the sense of the essence of it, and the essence of it, I feel, is that we establish the costs of the airport, we relate the costs to the functional areas of the airport, we relate the

use made of those particular functional areas, and we distribute the cost to the users on that basis. Now, various airports that use the cost allocation basis may have variations in the actual translation of the cost by functional area to rates and charges for the air carrier.

* * * *

[955] Q Am I correct that if oil were discovered in the landing area and the airport were able to sell the oil to an oil company by pumping it from land adjacent to the landing area, that would have no effect on the landing fee whatsoever; is that correct?

A Revenues are not used in the calculation. It is only the costs, the economic costs incurred.

[956] BY MR. HUNTING:

Q I take it, Mr. Brown, based on your years of experience, that there is no guarantee as to the availability of FAA or other federal funds in the future for airports?

A That's correct.

* * * *

TRIAL TESTIMONY OF PROFESSOR FERDINAND LEVY

[976] Q Would you indicate the scope of your initial review in this case as an economist?

A As an economist I reviewed the *Indianapolis* documents that I was talking about with respect to the theories used in that case for the judges to reach their conclusions which were presented in that case.

Q And are those economic theories rather than legal theories?

A Those were economic and cost accounting theories. Cost accounting to me is applied economics. I should say.

Q And what theories were those in that case that you reviewed as part of the initial scope of your job?

A Those are referred to as by-product theory, joint product theory, transfer pricing theory, interdependence, and theories of how concession revenues fit into those particular boxes.

[977] Q Would you indicate further the scope of your review as you understood it regarding the Buckley methodology principles or theories?

A I was asked to look at the Buckley methodology as a generalized methodology on a cost recovery, cost of service basis and asked to determine whether I believed that would lead to reasonable results in setting prices.

Q Did you become involved in any of the extensive details of the rate study in dispute or the similar historic rate studies?

A No, sir.

Q And can you state generally what the purpose of your review was as it relates to cost accounting, economic theory, use of financial ratios in a general sense, sir?

A I was asked to determine how good economics or good cost accounting—by good, I mean well accepted or well defined in the literature—applies in the Buckley methodology and in setting rates at airports, and I was asked to determine whether certain ratios were useful or applicable in determining performance.

Q Now, would you define for the Court from an economist's point of view the different types of risks that an entity, a person can take?

A We're talking about economic risk, I presume?

Q Yes.

[978] A Because when you cross the street you take a risk. The economists, financial people define two types of risk. They define business risk; that is, a person entering business as to whether they can recover their investment, equivalently as to whether the business will make a profit, how much money they have at risk in that particular business. And the second type of business which—second type of risk which the economists distinguish between is what's called financial risk, and that is when you go into business, you take a risk of investing your money, but you also take a financial risk. The business may be successful, but in order for the business to remain viable it has to repay its debts on time. In other words, it has

to maintain a cash flow to meet its bonded and loan obligations or its stockholder obligations.

So we have two types of risks. Business risk is the ability for a particular business to make a profit or remain viable. Then we have financial risk, or the ability of the business to meet its financial or monetary obligations on time.

Q Could you relate that to some simple example?

A Yes. Many people regard buying a house as a good risk. Buying a house is a business risk in the sense that what you're doing is you're trying to save money on rent or you're looking for appreciation in the value of the house. The risk that you take is, of course, the value of the house will [979] depreciate, you'll have an earthquake and you won't have insurance and so forth. The financial risk that you take when you have a mortgage on the house is that you will buy the house, it will appreciate in value and so forth, that's a business risk, but that you're able to meet your monthly obligations on time or else the bank or the mortgage company will foreclose on you.

Q During the course of your review of documents, did you come to learn that there are essentially two types of airport methodologies, a residual and a so-called cost of service methodology?

A Yes.

Q Would you relate these two types of risks, business risk and financial risk, to the residual methodology and to a cost of service, compensatory, or Buckley methodology, continuing on with your description of these two types of risks?

A Well, let me start with compensatory. In a compensatory methodology as I understand it the airport authority pays and takes a responsibility for building the airport and making the timely payments of its financial obligations on time. So the decision to build the airport, of course, is an economic decision with business risks. How to finance it involves financial risk, how to meet your

obligations on time. So in a compensatory situation the airport takes both a business risk and a financial risk. [980] As far as the airlines are concerned, they, of course, in deciding whether or not to service a particular airport means they're taking a business risk, but they have no financial risk whatsoever in the airport. They can leave the airport and the airport still has to make its financial obligations.

Q All of that description related to the Buckley or the cost of service or the compensatory methodology?

A Compensatory, yes, sir.

Q Would you continue on and provide the same analysis of business risk and financial risk as you understand it would relate to a residual type lease or methodology?

A I understand with a residual type lease that, of course, both the airport authority and the airlines are responsible for the financing and the meeting of financial obligations of the airport, so both have business risk and financial risk. That is, if the airport does not generate enough cash flow to pay the bonded indebtedness, the borrowings, then the airlines and the airport authority, I assume with its taxing mechanism, would have to make up the difference. Therefore, the airlines are taking a financial risk as well as a business risk by deciding to invest in the airport and to service the airport.

* * * *

[982] BY MR. HUNTING:

Q Let me ask it this way. It will make it simple, sir. Assume that since 1984, this airport has used a Buckley cost of service or compensatory rate-making methodology that, although not embodied in the lease, was used for the purpose of negotiating and determining lease terms. Would you relate that situation to your risk/reward analysis that you provided earlier?

A That means that if the airport were to make profits or returns over and above costs, the airport would be entitled to those returns because they are the people taking

the risk, both the business risk and the financial risk. On the other hand, if the airport were to have a shortfall in cash, not able to meet their obligations, the airport would also have to meet those obligations. So the airport is taking both financial risk and business risk with its compensatory methodology.

Q How do you relate—

A I—

Q Excuse me. Go ahead.

A I was going to answer on the airlines.

Q Okay. Would you take the other side of the equation, and that would be the airlines in a compensatory, Buckley, or cost of service methodology for the recent years in which that has been in use?

[983] A The airlines have basically paid the actual costs of the services and facilities that they use at the airport. If they decide—I haven't seen the lease, but they are only taking the business risk of coming in and out of Grand Rapids. They're not taking any financial risk associated with paying any of the obligations that the airport has incurred. So the airlines have no financial risk at all, only business risk in an economic accounting/financial sense.

Q And would you relate that also to the ability of the airlines not only to leave, but to cut back their service to whatever minimum service they might feel is appropriate?

A I would presume, given whatever it says in the lease, that they're able to leave. From what I've read, for example, in Moody's, airlines want short-term leases, they want flexible leases, they want the ability to change.

Q And with reference to your testimony, would you also relate the airlines' lack of investment in the non-aeronautical activities and facilities that generate that income?

A The airlines are not charged for the concessions or the parking lot and so forth. The airport has taken both business risk and financial risk. They have taken the risk

of building the facilities, that's a business risk, and the risk of paying for them on time in a timely fashion, and that's a financial risk. So the airlines have no investment, financial or [984] business-wise, whatsoever in the concessions.

Q Now, would you indicate what the principles of the Buckley methodology apply to, distinguishing between methods of allocation as between costs, revenues, or any other standards that might be used in your type of work?

A The Buckley methodology is strictly a cost of service methodology in that it is based on actual costs incurred to service a particular user of the facility. Therefore, it is designed to recover costs, for example, of the runways and aprons and the airline terminal part that is used by the airlines from the airlines, and to look at it on a cost-only basis of the concessions revenue from those people who profit from operating concessions at the airport.

Q Are there other completely different types of cost allocation systems that might relate to things other than costs, and would you just give some description of what other types of systems could be used in other circumstances?

A You could use a revenue base. For example, let me give you—you could look at how much revenue the concessions generate at the airport and you could look at how much revenue the airlines generate at the airport. Now, this is not Buckley methodology. This is a methodology out of a textbook, and you could look at the sum of the two and just take the proportion that the concessions generate and charge that to the concessions, take the proportion that the airlines [985] generate and charge that to the airlines. That's one way. You could look at the number of people served. You could ask how many people do the airlines serve and how many people do the concessions serve and you could allocate that way. I could give you an example from this building right here.

* * * *

[986] Q And would it be fair to say that most cost allocation systems in your experience are either based completely on costs or completely on revenue or completely on some other agreed-upon criteria?

A Yes. Well, there's—there are other criteria. But when you talk about any of the terminology that's been used in this case, there's no such thing as splitting how you allocate costs. It's done in one way, and there are many ways you can do it.

Q Once that way is chosen, it should then be applied consistently throughout as to the people it impacts?

A Yes.

Q Now, would you, with the Court's permission, go to the blackboard and would you demonstrate if you can the Indianapolis cost accounting theories mentioned in the opinions in that case as it relates to multiple products, joint products, and by-products, taking into account both the teaching experience and any actual other experience you've had with such things, sir.

[987] A There is an adage, Never give a teacher a piece of chalk.

Q Well, you've got a time limit, so—

A It's not in *Indianapolis*, but what we're really talking about in this is multiple products or multiple services, and by that I mean a firm produces more than one output. Now, we can split these multiple services and multiple products into two different things, what are called independent products. You don't have to produce them, but you can produce one without the other. A university, for example, produces educational services, they can also run a travel agency business on campus. They don't have to, and lots of universities do because it's a way of making money that we'll talk about later. But you don't have to run a travel agency to run a university.

Now, on the other hand, we have what are called joint products, and those are what are referred to in *Indianapolis*, and joint products are products that have to be produced together in some fixed proportion. Now, this

proportion can vary, but in general they always have to be produced together. The common example given in almost every textbook is if you want to produce leather, you get beef, and if you want to produce beef, you get leather. One cow is so many pounds of beef and so many square feet of leather.

Now, joint products are usually split into two different categories. One is thought of where the products [988] are relatively all-important. That would be beef and leather. At a refinery it could be kerosene and crude oil and gasoline, and then what are called by-products, and by-products, a by-product is a joint product that has relatively insignificant sales value compared to the other products that are being produced.

Now, at a refinery, every refinery that uses catalytic cracking as a way of breaking down crude oil also produces waxes, and waxes are generally regarded as by-products. In the industry I was in, which is producing paper boxes, we print those flat on the sheet and then we cut and crease the boxes and strip away the outside of the sheets, the interconnections among the boxes, and what we do with that is sell it as scrap. Scrap is a by-product. The scrap if you were a jeweler would not be a by-product because the gold that's picked up is a joint product and figured separately.

So there are many different ways of accounting for joint products, many different ways of accounting for independent products. The thing that distinguishes by-products in accounting, in any method of what's called by-products is if the joint products are relatively important together, then we worry about allocating the common cost before the split-off point, before they were identifiable as separate products; before there were beef and leather, that is, let's say, after the steer got killed. By-products, we [989] don't worry about any allocation of cost before the split-off point. And again, there are many ways to account—there are many methodologies to account for by-products. But the point here is that joint

products in any textbook definition, in any managerial accounting textbook definition, have to be produced together. You get one, you get the other. You can't produce electricity without producing steam because we're converting mechanical energy into electrical energy.

Independent products, it's up to the firm what they want to produce. If Georgia Tech—the example to me here is an airport. The airport has to produce airport landing services. It doesn't necessarily have to produce a car rental place or anything like that.

Q Would you continue on and, from an economist's point of view, describe transfer pricing concepts as you understand them either to be in this case or to have been utilized and applied in the earlier *Indianapolis* case?

A Transfer pricing works in a decentralized organization. You decentralize an organization because it's too big to control centrally. For example, General Motors is too big for one person to make all the decisions of how many batteries it should produce both for internal use and external use; how many spark plugs; if it owned a steel mill, I don't know that it does, how much steel it should produce. So they split it into divisions. They might split in into an automotive [990] division, a spark plug division, and so forth. But there's no such thing as transfer pricing without decentralization because if you have centralization, there's no need to worry about how individual units are doing. You're just looking over the whole operation. So we're talking about decentralization, first of all.

On a more global level, the U.S. economy is decentralized. We all make decisions, and the collective action of all of our decisions affects what's produced and how it's priced. The Russian economy, on the other hand, I don't know what it is now, used to be centralized. There's no transfer pricing. All the pricing is set from above.

Now, transfer pricing is used as a way of transferring from one division to another—how much Buick should pay the spark plug division for the spark plugs, how much

they should pay the steel division for steel, how much they should pay the casting division for the motor. There are many different ways to set transfer prices. The idea is to evaluate the way we economists and accountants put it is every tub on its own bottom. We look at the spark plug division, we look at its sales as a profit center, its costs, and ask whether it's making money, and we look at its return on investment. We look at return on investment in the automobile division and so forth. But it basically is only with, as every textbook starts off, it says decentralization/transfer [991] pricing, divisional performance/transfer pricing. It's only used in a decentralized fashion.

Q Would you relate the concept of decentralization to the ownership of the airport for purposes of your recent testimony?

A Well, the airport, the airport is a centralized authority, it seems, where the airport management makes the decisions on what to do and there is no transfer among the particular divisions.

Q You can take the stand again, if you will.

In particular, Professor Levy, I'm going to show you Plaintiff's Exhibit Number 303 and ask you from an economist's point of view whether this particular document does or does not represent any type of split-off chart or split-off presentation as it might relate to by-products, joint products, or multiple products?

A Not that I can see.

* * * *

Q Is there a single mandatory cost accounting way to deal with either multiple products, joint products, or by-products?

[992] A No. If you pick up any textbook, and I happen to have brought some with me this morning, if you pick up any textbook and you look at joint products, off the top of my head I can think of three ways in general right now to account for joint products, and if I look at by-products, I think the professors' books that I've read, eight, nine, ten different ways to account for by-products,

and independent products or multiple products the same way. There's no unique single unambiguous way to account. It's done for management's convenience in the way they want to handle it.

Q And in this particular instance who do you understand to be management so far as the airport is concerned?

A I presume the airport board or the airport management make the key decisions.

Q Given the scenario of multiple products or services, joint products, and by-products, in your experience is there any cost accounting requirement that concession revenues or non-aeronautical revenues be credited directly or indirectly to the airlines or in any way subtracted from the airlines' costs that may be reflected in landing fees, terminal rental rates, or overnight aircraft parking fees?

A Is there any one—there might be a requirement in the sense that people might sign a lease to that effect. But there's no cost accounting requirement. There's lots of different freedoms, lots of freedom on how to choose the [993] accounting system as long as there's no statutory contractual agreement, which is out of my realm of expertise.

Q Would you, given your review of the Indianapolis Airport Authority case, discuss the doctrine of interdependencies as used in that case regarding the airport, the airlines, and concession revenues, taking into account the experience you've had as an economist in such matters?

A Interdependency and mutual dependency to me are two words that are synonymous, two phrases that are synonymous. If you have two entities, A and B, and they're interdependent, what A does affects B and vice versa. And often things look like that might happen. A affects B and vice versa, but in general, for example, at an airport, the airport is the reason the airlines are there and the airport is the reason the concessions are there, and the only reason the airport is there is to facilitate travel in and out of the particular metropolitan area.

So it's a metropolitan area through its building of the airport that attracts the airlines. They are interdependent on the metropolitan area, as is the concessions. Therefore, they're both dependent on the metropolitan area, and they're not interdependent in the sense of one affects the other. For example, you could cut out all the concessions and you could still have the airport and the airlines.

* * * *

[995] Q Would you define as an economist the phrase "derived demand?"

A A derived demand is a demand for a product or a service used to help satisfy a final demand. Let me give an example, might work better. Businesses don't want to hire engineers. They want to make products, but they need to hire engineers to make those products and refine them. So they hire engineers in order to satisfy their final demand of making products. Companies don't like to buy airplane tickets, but they buy airplane tickets on airlines in order to send their salesmen to other places to sell their products. So their demand for airline tickets is a derived demand.

Q Would you relate that concept to the airport here, the Kent County International Airport, as it relates to the issues in this case?

A The demand for airline services in and out of Kent County is a derived demand of people, of persons to either go to or leave Grand Rapids. Now, you can think of three major classes of people who use airlines. Those are people who have business either in Grand Rapids or people in Grand Rapids who have business outside of Grand Rapids, and they use airlines to satisfy their demands to handle that business. You have people who go on vacations and use the airlines to do that, [996] either vacationing in Grand Rapids—I don't know. I'm from New Orleans originally. They have Mardi Gras, the Super Bowl. People take airplanes to go to the Mardi Gras and the Super Bowl to visit New Orleans. The same thing

might be true in Grand Rapids. And then you have families visting back and forth in and out of Grand Rapids, and then you have—I don't know if this is business, I might be straining a little bit, government employees and military employees who the government is traveling around. People don't take airplanes for the joy of taking airplanes. They take airplanes to either come into a metropolitan area or leave a metropolitan area.

Q Would you relate that derived demand analysis to the airlines' side of the equation?

A Well, the airlines look at the potential passenger flow into and out of a particular city, here Grand Rapids, and schedule their airlines' airplanes vis-a-vis the financial constraints that they have on number of planes and what have you, other communities, in deciding how to schedule capacity and times of flights in and out of Grand Rapids. But they take the people's demand for travel to and from in deciding how to schedule their flights in and out of Grand Rapids.

Q From an accounting—

A I—

Q Excuse me.

A I was going to say that if this were Waxahatchee, Texas, [997] and they built a beautiful airport and built beautiful runways and the oil industry is dead, they still wouldn't survive because nobody really wants to go in and out of Waxahatchee, Texas. That's a figurative example, not a literal one. You wouldn't have too much airline traffic in and out, either.

Q Would you relate the concept of derived demand, the airport and the airlines' attempt to satisfy that demand or need, for instance, to available seats on an airplane and the number of planes to bring this into some kind of simple example?

A Well, the airlines estimate the demand in and out of Grand Rapids—to other cities. Of course, they're all interrelated. The demand to leave Grand Rapids might be the demand to go to Chicago or Detroit. And then

they look at the number of people, they look at the competition that's already there. You don't start *de novo*, and then they look at the additional market capacity and what prices this capacity should be priced.

Q Can you give some example in terms of your experience as an economist as to what might or might not happen if there was a doubling or tripling of the planes brought into Grand Rapids as it may relate to derived demand and the community involvement in this type of issue?

A Well, I would assume that the airlines are profit maximizers and that at any given time, given the demand for [1998] air travel into Grand Rapids and out of Grand Rapids, given the competitive structure of the market, they are maximizing their profits. That means any reduction, assuming demand stays the same, any reduction in service would lower their profits and any increase in service would lower their profits. Reduction in service would lower their profits because they would be giving up passengers they could carry. The increase in service would also be lowering their profits because it would be providing more capacity than there is demand for.

Q Would you define as an economist the doctrine of economies of scope or scale?

A Those two are entirely different—

Q Let's take scope first.

A Okay. Economies of scope is the ability of a single firm to offer more than one product or service which may or may not be related in use at lesser cost or greater profit than two different firms. A classic example is when you go to the movies, the movie theaters have a popcorn counter. The reason they have a popcorn counter is that's economies of scope. They're able to sell popcorn probably more cheaply than people across the street, or utility of place.

Q Now, would you explain economies of scale?

A Economies of scale is the—suggests that if you double the output, you can do that without doubling the cost.

Q Now, would you apply either of those applicable concepts [1999] to the airport situation as it relates to the non-aeronautical revenues or the concession revenues at the airport?

A Well, the non-aeronautical revenues arise, to me, because of economies of scope. It is the ability of the airport to satisfy the demand for restaurant services, parking services more cheaply and more efficiently than those can be satisfied off of the airport premises. If it were not true, I would presume the airport would not provide those services. There's no reason why they have to provide those services.

Q Are you able to provide any helpful example regarding cost allocation methods on a space basis that you might be able to analogize to the airport or to Buckley or to some of the contentions in this case?

A Space allocation?

Q Yes.

A Well, I think the one we talked about earlier, this Federal Building, which we could divide into United States District Court, the U.S. Post Office, and the Internal Revenue Service based on the amount of space that they take up. If you were to—that's one way to do it. Another way to do it is to say if we built this court and we did it *de novo* separately, how much would it cost, and then if we added on the concessions, how much they—not concessions, the Internal Revenue Service, how much would that cost, and we added the Post Office, how much would that cost. And then, [1000] since they're three different things, we can do it six different ways on a space basis and then average what each one costs. That would be a way of zero-based budgeting which takes into account—doesn't worry about which came first, A, B or C.

Q Can you provide any helpful examples, let's say the sale of automobiles and showroom floor space, in

terms of application to the issue as you understand it, in this case?

A Well, there's an Oldsmobile dealer in Atlanta, Mitchell Motors, that sells Oldsmobiles and it sells Rolls-Royces. I know, I'm the market for Rolls-Royces. But anyway, for simplicity's sake let's assume it sells as many Rolls-Royces as Oldsmobiles. Now, Rolls-Royces are a lot more expensive than Oldsmobiles. I would guess at least five to six times as expensive, and let's assume that they share equally the showroom floor. Now, you can certainly allocate the showroom floor on the basis of the number of square feet that each occupied, or you could allocate another number of how much revenue the Oldsmobile generates and how much revenue the Rolls-Royce generates.

Q Would you come back again and confirm the type of cost allocation approach or methodology that is represented by Buckley?

A Well, Buckley, of course, allocates outside the terminal when it comes to airline landing services the facilities that [1001] are related to the airlines, but inside the terminal it's basically on a functional square footage usage allocated between the concessions and the airlines.

Q How do economists, in your experience, measure the financial performance of an entity?

A Whether it's an entity or an individual, in the performance we look at what we call return on investment, ROI, return on equity, what we own.

Q Professor Levy, do you have an opinion, based on your education, your experience, and your review of the facts of this case and the materials in the *Indianapolis Airport Authority* case as they have been previously described here today, as to whether it is appropriate in this case for the airlines to utilize a ratio of net income to the sales of the airport to maintain that the rates, fees and charges of the airport to the airlines are unreasonable?

A No. I do have an opinion, but I—

Q What is your opinion?

A My opinion is that that's really—I hate to use my students' expression, but that would really be far out. That would be—the return on sales is something that's just not found in accounting, accounting textbooks and cost accounting, or in dictionaries for accountants.

Q And did you in particular make a search of those textbooks and reliable sources of information to find whether there was [1002] any return on sales ratio or approach used and applied in the way in which the airlines have done it in this case?

A Yes, I did.

Q And what did you find?

A Didn't find it mentioned, much less defined.

Q And did you find it applied in any way as you understand it applied in this case?

A No. No, I didn't.

Q Professor Levy, do you have an opinion, based upon your education, your experience, your review of the facts and materials in this case as previously described here today, as to whether, from an economic point of view, the concession revenues should be used to reduce the airline costs at this airport?

A Yes.

Q And what is that opinion, sir?

A That there is really no economic reason for that to occur since the airlines did not take any of the risk of investing in the airport or investing in the concessions; that the risk of the concessions, make it or fail, will be borne by the airport authority.

Q Continuing on, sir, do you have an opinion, based on your education, your experience, and your review of the facts of this case as previously described here today, as to whether it is reasonable from an economic point of view to continue to [1003] allow the airport to retain all concession or all non-aeronautical revenues?

A Yes.

Q And what is that opinion, sir?

A That it certainly sounds reasonable, and the reason is very simple. They bore the risk of building the airport, both business and financial. They bore the risk of putting concession revenues—concession stands there. And the other thing, of course, is it facilitates, since all the revenues have to be used for airport purposes, it facilitates future expansions and enhancements of the facilities and services, and it also provides a wonderful contingency fee for them if something happened, let's hope it doesn't, like what happened in San Francisco in October.

Q Sir, do you have an opinion based on your education, your experience, and your review of the facts of this case as previously described here today as to whether the Buckley cost of service methodology in principle or theory produces reasonable results by way of landing fees, terminal rental rates, and overnight aircraft parking fees?

A Yes.

Q What is that opinion, sir?

A That since it's a cost of service-based methodology, and under the assumption that the costs of the materials and services they purchase are competitively based; that is [1004] there's competition for these, that this would from an economics point of view lead to a competitive, efficient allocation of resources. That is, it would be the cheapest possible way to do something.

Secondly, it is definable to the airport. It is the way—it's the cheapest cost way, it's an economically efficient way, it's basically the way the government does procurement on a competitive cost basis, and it's a way you would come out if you started *de novo* with the cheapest historical costs from what we call a zero-based budgeting to get this. So it's reasonable because it provides the cheapest cost to the airlines, and even more, an economist would look at it from the other way. It's the cheapest cost to society of giving up those resources to build that airport.

* * * *

[1019] Q Do the rental car companies pay ten percent of their gross to the airport because of the square footage they rent or because they have access to the flow of airline passengers?

A They have access to the people coming into Grand Rapids and the people leaving Grand Rapids. I presume that's an accurate statement of rent. I mean—

* * * *

[1024] Q Am I correct that during your deposition we talked about the general aviation operation and use of the airfield, and didn't you tell me that you realized that the airlines and the concessions together subsidized the general operation, general aviation operation in the airfield?

A I remember saying that your—I remember the comment reading, and I certainly heard it yesterday, that general aviation does not pay the full cost allocated to it.

Q And that money then comes from the concessions and from the airlines; isn't that correct?

A I would assume it basically comes from the concessions, sir, because the airlines pay the actual cost of their using the airport.

Q Based upon the square footage method of dividing between the various users; is that correct?

A Based upon the Buckley methodology as applied here.

Q And so the concessions, the money that comes from the concessions, I understand the people who ultimately pay that are the airline passengers; is that correct?

[1025] A And the people from Grand Rapids who come to the airport.

Q To pick up passengers?

A Or, as they did on Sunday, to watch the planes come in and out.

Q Or to eat in the restaurant?

A That's correct.

Q And if you eat in the restaurant, don't you get free parking in the airport parking lot?

A I don't know, sir. I've never had a car at the Grand Rapids airport.

Q You didn't check into that; is that correct?

A Yes.

Q Isn't it true that the airport generates customer flow for the rental car companies in part by providing aeronautical services to the airlines?

A Sir, that's a—the answer is the community. The answer is without the airlines there wouldn't be passenger cars there, and without Grand Rapids, sir, there wouldn't be the airlines there. So Grand Rapids generates—just as the rate payers are the eventual payers, sir, in the thing before. Grand Rapids is the eventual provider of the people who rent cars at the airport. It's exactly the same thing, as you said, who ultimately pays.

Q Isn't it true that you said during your deposition that neither Horngren nor Dompke were qualified to testify [1026] concerning the reasonableness of the rates involved?

A That's correct, sir. Neither one were economists, and the idea of reasonableness has to do with efficiency in an economic system. Neither one have Ph.D.s in economics.

* * * *

PLAINTIFF'S EXHIBIT 6

FEES FOR THE USE OF PUBLIC AIRCRAFT

FACILITIES AND

RENTAL FOR PASSENGER TERMINAL PREMISES

KENT COUNTY INTERNATIONAL AIRPORT

THREE YEARS BEGINNING JANUARY 1, 1987

DECEMBER 31, 1986

**FEES FOR THE USE OF PUBLIC AIRCRAFT
FACILITIES AND
RENTAL FOR PASSENGER TERMINAL PREMISES**

Three Years Beginning January 1, 1987

A. Structure and Level of Rates

On the basis of the general principles with respect to airport rate-making, and the detailed discussion of rates, fees, rentals, and other charges presented in Section B, C and D inclusive, it is determined that during the three years beginning January 1, 1987, the structure and level of rates at the Kent County International Airport be as follows:

1. For the use of the Landing Area:

- a. By aircraft of a scheduled airline, the appropriate fee for each departure, including the preceding landing, if either be for revenue, expressed in terms of a rate per thousand pounds of maximum allowable gross weight of the aircraft for landing is:

\$.7021

The above charge should include the right to use aircraft loading positions on the Passenger Terminal Apron. There should be no charge for a departure by such aircraft if neither the departure, nor the preceding landing, be for revenue.

2. For space in the Passenger Terminal Building, the annual rental rates per square foot should be as follows:

Type of Space (1)	Rate per Square Foot (2)
Enclosed, Air Conditioned	\$25.46
Enclosed, AC-Heated-Unfinished	12.34

The above rental rates are appropriate only under Agreements and Leases where the Board's responsibility for services does not exceed that shown in Exhibit 10. These rates should be firm and not affected by the volume or the value of the business done by the tenant, where the tenant is a scheduled airline authorized to provide service to Kent County.

In the case of other tenants, the Board should fix the rental rates at such levels, relative to the above, as may be required by the exercise of sound business judgment, including the establishment of minimum guarantees, with the actual rent determined by the minimum guarantee or by a percentage of the volume of the business done by the tenant, whichever be greater.

3. With respect to paved airline aircraft parking,

A rate is established for the use of the paved airline aircraft parking space of 34.32 cents per thousand pounds of maximum allowable gross weight for landing for each eight hours, or fraction thereof, with no free use of such area permitted.

B. Fees for the Use of the Landing Area

The Landing Area at the airport is considered to include the runways and taxiways, the passenger terminal apron and the related land required to meet normal clearance requirements related thereto. The break-even need for the landing area, as shown in Exhibit 1, is the sum of the break-even need for the runways and taxiways, and for the passenger terminal apron. This break-even need is as follows:

Annual Break-Even Need of the Landing Area

<u>Landing Area Sub-Areas</u>	<u>Annual Break-Even Need</u>
(1)	(2)
Runways and Taxiways	\$1,183,719
Passenger Terminal Apron	222,877
Freight Terminal Apron	23,007
Total	1,429,603

The costs applicable to each of these sub-areas of the landing area have been accumulated separately because of the portion of their break-even need which should be allocated to each class of use will vary as between them. Each will be discussed individually.

Passenger Terminal Apron Sub-Area

The loading positions at the Passenger Terminal Building have been designed primarily on the basis of the requirements of scheduled air carriers. No provision has been made for the use of loading positions on the Passenger Terminal Apron by air taxis and supplementals. Consequently, 100 percent of the break-even need for the Passenger Terminal Apron has been assigned to the scheduled air carrier, and the balance to air taxis and supplementals.

Public Runways and Taxiways

The Runways and Taxiways will be used by scheduled air carriers, and by general aviation. The distribution of the break-even need of the Runways and Taxiways as between these types of users are based on a combination of the following factors:

1. The number of aircraft departures in relation to total aircraft departures.
2. The maximum allowable gross weight at take-off of aircraft departing the airport in relation to the maximum allowable gross weight at take-off of all aircraft departing the airport.

The use of aircraft departures to allocate Runway and Taxiway costs bases such an allocation on the airspace capacity, and hence runway capacity utilized.

The use of maximum allowable gross weight at take-off of aircraft lifted from the airport to allocate Runway and Taxiway costs gives recognition to the added costs involved in the provision of airport facilities adequate to handle large airline aircraft. It fails, however, to recognize the fact that the airline operations are with heavy aircraft, and hence use up less airspace and runway capacity in relation to weight lifted than do non-airline civil aircraft operations.

It is considered necessary, therefore, to allocate Runway and Taxiway break-even need on the basis of a formula which gives equal weight both to aircraft departures and to the maximum allowable gross weight at take-off of aircraft lifted from the airport. To achieve such an allocation, forecasts have been made of prospective average annual departures by each type of airport user during the average maximum allowable gross weight at take-off of the aircraft in prospective use by each type of user. The results, from the standpoint of percentage distribution of Runway and Taxiway break-even need, are as follows:

Distribution of Break-Even Need for Runways and Taxiways

Average Annual Departures

Type of Operation (1)	Weight			Percent of Total		
	Number (2)	Average (lbs.) (3)	Total (M lbs.) (4)	Departures (5)	Weight (6)	Combined (7)
Scheduled Airlines	22,981	72,754	1,671,960	16.28	73.74	45.01
Other Air Carrier	36	131,700	4,741	.03	.21	.12
Air Taxis	-0-	-0-	-0-	-0-	-0-	-0-
General Aviation	118,151	5,000	590,755	83.69	26.05	54.87
Total	141,168		2,267,456	100.00	100.00	100.00

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The Landing Area As A Whole

On the basis of the above discussions, it is possible to establish the total annual amount to be recovered from the various airport users and their respective fair shares of the break-even need of the Landing Area. The resulting total break-even need for the Landing Area, and its distribution among users of the Landing Area, are as follows:

Distribution Among Landing Area Users of Landing
Area Break-Even Need

200

Item (1)	Distribution Among Landing Area Users			
	Total Amount (2)	Scheduled Airlines (3)	Other Air Carrier (4)	Air Taxis (5)
Break-even need of the Passenger Terminal Apron	\$222,877	222,877	-0-	-0-
Break-even need of the Runways and Taxiways	1,183,719	532,792	1,438	-0-
Break-even need of the Freight Terminal Apron	23,007	23,007	-0-	-0-
Total	\$1,429,603	778,676	1,438	-0-
Add: Cost of Fire Dept.		395,212		
		<u>\$1,173,888</u>		
				650,927

General
Aviation
(6)

201

On the basis of the above, the fee which is applicable to the use of the Landing Area by the scheduled airlines during the three years beginning January 1, 1987, is as follows:

1. The scheduled airlines' share of the break-even need of the Landing Area was found to be: \$1,173,888
2. The prospective maximum allowable gross weight for landing of average annual revenue departures by airline aircraft in the rate-making period here under consideration was found to be: 1,671,957,670 lbs.
3. The maximum allowable gross weight for take-off would be: 1,898,000,000 lbs.
4. The fee for the use of the Landing Area by revenue flights of the scheduled airlines, in terms of a rate per thousand pounds of maximum allowable gross weight for landing would therefore be: \$.7021

C. Rental for Space in Passenger Terminal Building

The determination of equitable rental rates for space in the Passenger Terminal Building required consideration of several controlling and limiting factors. These were:

1. The amount of potentially revenue-producing space to be provided.
2. The weight to be given to the variations in cost as between the different types of space provided.
3. The average vacancy for which allowance should be made.
4. Services to be provided by the Aeronautics Board.

Each of these factors will be discussed individually.

Revenue-Producing Space Provided

The Revenue-Producing Space provided in the Passenger Terminal Building as of January 1, 1984, the beginning of the rate-making period here under consideration, is 108,969 square feet.

Weight to be Given Variations in Cost

The several varieties of space provided in the Terminal Building makes it necessary to apply proper weighting factors to the various types of space in order to convert the break-even need to an equitable system of rental rates. Weighting factors were assigned to the various types of space provided in the Terminal Building on the basis of construction costs. When the average amount of each type of revenue-producing space available is weighted by the factor indicative of its relative cost, the equivalent basic rental units are as follows:

Determination of Equivalent Basic Rental Units

Type of Space	Average Square Feet To Be Available	Weighting Factor	Equivalent Rental Units
(1)	(2)	(3)	(4)
Enclosed, air conditioned finished	64,853	1.00	64,853
Enclosed, AC-Heat-Unfinished	44,116	.50	22,058
Total	108,969		86,911

Allowance for Vacancy

No allowance has been made for vacancy in establishing rates per square foot.

Services to be Provided by the Board

The break-even need developed for the Terminal Building necessarily has been based on definite assumptions as

to the services to be provided by the Aeronautics Board and those to be provided by its tenants. The services provided by the Aeronautics Board in the various types of airline space in the Terminal Building are shown in Exhibit 10.

Basic Passenger Terminal Building Rentals

The basic rental rates for floor space in the Passenger Terminal Building are rates which cover facilities and services which are made available to any tenant, and exclude any special installations made for a single tenant or for a group of tenants. This has been carried out with respect to the premises occupied by Marriott Corporation by the separate accumulation of break-even need in Line 2-b of Exhibit 1, applicable to special installations and services provided for the use of this tenant. Separate presentation has not been made, however, in Exhibit 1 with respect to the break-even need applicable to the installation and maintenance of Carousels, and the furnishing and operation of Gate Lobbies. These data are as follows:

Break-Even Need Applicable to the Installation and Maintenance of Carousels, and the Furnishing and Operation of Holding and Lounge Rooms

Item	Carousels	Lobbies	Grand Total
(1)	(2)	(3)	(4)
Carrying Charges	\$7,025	\$11,196	\$18,221
O & M—Direct	6,925	-0-	6,925
Related Admin. Exp.	492	784	1,276
Total	\$14,442	\$11,980	\$26,422

In addition to the above total, which should appropriately be deducted from the Passenger Terminal Building break-even need in order to establish the basic rental rates, the Board can expect to receive from the rental of advertising wall space within the Terminal, income which will

not require the use of any floor space. We estimate that during the rate-making period here under consideration, the average annual amount of such income should be approximately \$50,000.

When consideration is given to the factors discussed above, the appropriate basic rental rates for floor space in the Passenger Terminal Building are found to be as follows:

1. Break-even need from Exhibit 1		\$2,277,179
2. Deductions		
a. Carousels and Gate Lobbies	\$26,422	
b. Prospective income from wall space not requiring floor space	50,000	76,422
3. Net to be recovered through space rental		2,200,757
4. The income-producing floor space on which to base the rental schedule was found above to be equivalent, in terms of basic rental units, to		86,911
5. This gives the following average break-even need for each type of potentially revenue-producing floor space available in the Terminal Building:		

Average Break-Even Need for Each Type of Potentially Revenue-Producing Floor Space Available in the Terminal Building

Type of Space	Average Break-Even Need Per Square Foot
(1)	(2)
Enclosed, air conditioned	\$25.32
Enclosed, AC-Heat-Unfinished	12.66

6. It should be noted that the above-established rates are intended to be the full rental charge, other than for ancillary services, for space made available to airlines, other aeronautical interests, and Federal Government; but to be simply minimums against percentages of gross business in the case of space made available to concessionnaires.

Recovery of Break-Even Need for Carousels

To recover the break-even need on the Carousels, it will be necessary to recover both the basic space rental and the average annual charges on the equipment which has been installed. These are as follows:

1. Basic Space Rental		
5,771 square feet of enclosed air conditioned space of \$25.32	\$146,122	
7,972 square feet of enclosed space, unheated, utility finish, at \$12.66	100,925	247,047
2. Charges on Equipment		14,442
Total		\$261,489

Recovery of Break-Even Need for Baggage Make-up-area

1. Basic Space Rental	
15,289 square feet of enclosed space, utility finish at \$12.66	193,559
Total	\$193,559

Distribution of Annual Charges to be Recovered Based on ATA Formula
(to be recomputed annually)
Distribution of Costs for 1987

Total Amount to be Recovered	\$455,048
Less:	
Amount received from Supplemental Airlines—1986	-0-
Total Airline Share	<u>\$455,048</u>

Airline	1986	Percent	Baggage Claim		Total	Baggage Mark-Up			Grand Total
	Enplaned Passengers		20%	80%		20%	80%	Total	
West Baggage Area									
American:	84,447	13.68%	\$4,358.15	\$28,610.02	\$32,968.17	\$3,274.24	\$20,369.90	\$23,644.14	\$56,612.30
Express I:	2,955	0.48%	\$4,358.15	\$1,001.13	\$5,359.28	\$3,274.24	\$712.79	\$3,987.03	\$9,346.31
Northwest:	213,336	34.55%	\$4,358.15	\$72,276.65	\$76,634.80	\$3,274.24	\$51,459.88	\$54,734.12	\$131,368.92
Simmons:	25,684	4.16%	\$4,358.15	\$8,701.55	\$13,059.70	\$3,274.24	\$6,195.37	\$9,469.61	\$22,529.31
USAir:	53,648	8.69%	\$4,358.15	\$18,175.54	\$22,533.69	\$3,274.24	\$12,940.71	\$16,214.95	\$38,748.64
Florida Express:	0	0.00%	\$4,358.15	\$0.00	\$4,358.15	\$3,274.24	\$0.00	\$3,274.24	\$7,632.39
Airport:						\$3,274.24		\$3,274.24	\$3,274.24
Total West Passengers	380,070								
					Total	\$22,919.66	\$91,678.66	\$114,598.32	
East Baggage Area									
ComAir:	433	0.07%	\$4,358.15	\$146.70	\$4,504.85	\$2,632.02	\$115.22	\$2,747.23	\$7,252.06
Commuter Express:	0	0.00%	\$4,358.15	\$0.00	\$4,358.15	\$2,632.01	\$0.00	\$2,632.01	\$6,990.16
Midstate:	11,867	1.92%	\$4,358.15	\$4,020.45	\$8,378.60	\$2,632.01	\$3,157.74	\$5,789.75	\$14,168.35
Midway Connection:	0	0.00%	\$4,358.15	\$0.00	\$4,358.15	\$877.34	\$0.00	\$877.34	\$3,235.49
Piedmont:	94,205	15.26%	\$4,358.15	\$31,915.95	\$36,274.10	\$2,632.01	\$25,067.39	\$27,699.41	\$63,973.51
United:	130,886	21.20%	\$4,358.15	\$44,343.20	\$48,701.35	\$2,632.01	\$34,827.99	\$37,460.00	\$86,161.36
Airport:						\$1,754.68		\$1,754.68	\$1,754.68
Total East Passengers	237,391								
Total	617,461	100.00%	\$52,297.80	\$209,191.20	\$261,489.00	\$15,792.08	\$63,168.34	\$78,960.42	\$455,047.74

D. Break-Even Need for Paved Airline Aircraft Parking

Yearly Break-Even Need 3 spaces from Exhibit #1	\$28,914
Yearly Break-Even Need 1 space	9,638
Daily Break-Even 1 space	26.40
Break-Even Need Per Space @66 2/3% load factor	39.64
Amount Required Per 1,000 # gross landing weight for each 8 hour period	.32

EXHIBIT 3

KENT COUNTY DEPARTMENT OF AERONAUTICS
AVERAGE ANNUAL BREAK-EVEN NEED BY REVENUE PRODUCING AREAS
THREE YEARS BEGINNING JANUARY 1, 1987

REVENUE PRODUCING AREA (1)	LAND (2)	GENERAL PURPOSE FACILITY (3)	DIRECT ADMINISTRATION INVESTMENT OPER. & MAINT. (4)	(5)	GRAND TOTAL (6)
LANDING AREA					
A. RUNWAY & TAXIWAY	55,122	142,181	279,180	707,236	1,183,719
B. PASSENGER TERM. APRON	2,455	6,324	48,768	165,330	222,877
C. FREIGHT TERM. APRON	27	67		22,913	23,007
SUB TOTAL	57,604	148,572	327,948	895,479	1,429,603
PASSENGER TERMINAL BLDG.					
A. BASIC	294	2,076	827,328	1,447,481	2,277,179
B. MARRIOTT PREMISES	0	0	42,840	0	42,840
SUB TOTAL	294	2,076	870,168	1,447,481	2,320,019
PUBLIC AUTO PARKING					
A. PASSENGER TERMINAL	535	3,760	315,324	367,931	687,550
B. UNIT STORAGE HANGARS	160	1,130	0	21,365	22,655
SUB TOTAL	695	4,890	315,324	389,296	710,205
FREIGHT TERMINAL BLDG.	36	246	68,964	5,796	75,042
AIRCRAFT PARK. & TIE DOWN					
A. AIRLINE AIRCRAFT PAVED	165	1,149	5,160	21,794	28,268
B. GEN. AVIATION PAVED	165	1,149	4,176	38,188	43,678
C. GEN. AVIATION UNPAVED	294	2,075	0	144	2,513
SUB TOTAL	624	4,373	9,336	60,126	74,459
AVIATION FUEL STORAGE	343	2,403	732	762	4,240
FIXED BASE OPERATORS					
A. NORTHERN AIR	611	4,277	21,852	52,204	78,944
B. GRAND AERO	472	3,293	77,964	23,654	105,383
C. SPARTA	107	1,297	0	13,897	15,301
SUB TOTAL	1,190	8,867	99,816	89,755	199,628
RENTAL BUILDINGS					
A. RENTAL BLDG. - AVIS	76	534	11,772	902	13,284
B. RENTAL BLDG. - HERTZ	76	534	13,992	902	15,504
C. RENTAL BLDG. - NAT'L.	76	534	28,536	902	30,048
D. RENTAL BLDG - BUDGET	76	534	35,616	902	37,128
E. MOTEL	334	2,342	76,164	40,947	119,787
SUB TOTAL	637	4,478	166,080	44,555	215,751
OTHER RENTAL LAND	23,711	98,095	0	2,300	124,106
TOTALS	85,134	274,000	1,858,368	2,935,550	5,153,053

KENT COUNTY DEPARTMENT OF AERONAUTICS
 DEVELOPMENT OF AVERAGE ANNUAL CHARGES ATTRIBUTABLE TO INVESTMENT IN LAND
 THREE YEARS BEGINNING JANUARY 1, 1987

EXHIBIT 3

ITEM	INVESTMENTS				NET FOR RATE BASE
	ACRES	ACQUISITION COST	FED. AID	STATE AID	
ACQUISITION TO DATE	2097.21	\$1,765,773	\$597,609	\$0	\$1,168,164
AVERAGE ANNUAL CHARGE @8%					\$93,453
LESS 186.7 ACRES @AMORT OF 8%	186.7				\$8,319
AVERAGE ANNUAL CHARGE AT 8%	1910.51				\$85,134

KENT COUNTY DEPARTMENT OF AERONAUTICS
DISTRIBUTION OF REVENUE PRODUCING AREAS OF AVERAGE ANNUAL CHARGES
ATTRIBUTABLE TO INVESTMENT IN LAND
THREE YEARS BEGINNING JANUARY 1, 1987

EXHIBIT 4

REVENUE PRODUCING AREAS (1)	ACRES (2)	PERCENT (3)	AMOUNT (4)
1. LANDING AREA			
A. Runways & Taxiways	1237	64.75%	\$55,122
B. Passenger Terminal Area	55.1	2.88%	\$2,455
C. Freight Terminal Apron	0.6	0.03%	\$27
Sub Total	1292.7	67.66%	\$57,604
2. PASSENGER TERMINAL BUILDING			
Sub Total	6.6	0.35%	\$294
3. PUBLIC AUTO PARKING			
A. Passenger Terminal	12	0.63%	\$535
B. Unit Storage Hangars	3.6	0.19%	\$160
Sub Total	15.6	0.82%	\$695
4. FREIGHT TERMINAL BUILDING			
Sub Total	0.8	0.04%	\$36
5. AIRCRAFT PARKING AND TIE DOWN			
A. Airline Aircraft - Paved	3.7	0.19%	\$165
B. General Aviation - Paved	3.7	0.19%	\$165
C. General Aviation - Unpaved	6.6	0.35%	\$294
Sub Total	14	0.73%	\$624
6. AVIATION FUEL STORAGE			
A. Sub Total	7.7	0.40%	\$343
7. FIXED BASE OPERATORS			
A. Northern Air Service	13.7	0.72%	\$611
B. Grand Aero	10.6	0.55%	\$472
C. Sparta	2.4	0.13%	\$107
Sub Total	26.7	1.40%	\$1,190
8. RENTAL BUILDINGS			
A. Car Rental Service Bldg. #1	1.7	0.09%	\$76
B. Car Rental Service Bldg. #2	1.7	0.09%	\$76
C. Car Rental Service Bldg. #3	1.7	0.09%	\$76
D. Car Rental Service Bldg. #4	1.7	0.09%	\$76
E. Motel	7.5	0.39%	\$334
Sub Total	14.3	0.75%	\$637
9. OTHER RENTABLE LAND	532.11	27.85%	\$23,711
GRAND TOTAL	1910.51	100.00%	\$85,134

EXHIBIT 5

KENT COUNTY DEPARTMENT OF AERONAUTICS EXHIBIT 5
 AVERAGE ANNUAL CHARGE ATTRIBUTABLE TO DEPRECIABLE GENERAL PURPOSE INVESTMENT
 THREE YEARS BEGINNING JANUARY 1, 1987

Revenue Producing Assets And Direct Depreciable Investment Expenditures	Total Cost	INVESTMENTS		Net For Rate Base	Useful Life (Yrs)	Interest & Amort @ 8%	MONTHLY CARRYING CHARGES		Total Dollars	Begins On	3 YEARS BEGINNING 1-1-86		
		Deductions Fed. Aid	State Aid				RATES	Periodic Maintenance			Months In Use	Total	Average Annual
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	
ACCESS AND SERVICE ROADS													
ADDITIONS													
Paving	\$183,443	\$13,848	\$40,412	\$109,183	240	0.00837	0.00041	\$1,839	1-1-75	36	\$44,364	\$12,040	
Lighting	\$7,472	—	—	\$7,472	180	0.00954	0.00084	\$77	1-1-75	36	\$1,772	\$494	
with Street Improvements	\$102,139	—	—	\$102,139	240	0.00837	0.00041	\$898	12-1-78	36	\$33,328	\$9,274	
Terminal Road Expansion (C-43)	\$547,791	\$511,812	—	\$35,979	240	0.00837	0.00084	\$153	1-1-87	36	\$18,928	\$4,174	
Roadway Signs (C-44)	\$70,320	\$43,198	—	\$27,122	120	0.01214	0.00084	\$91	1-1-87	36	\$3,274	\$1,092	
Sub-Total	\$1,031,087	\$568,878	\$40,412	\$362,397				\$3,458			\$123,408	\$41,134	
AIRPORT MAINTENANCE CENTER													
New Building C-45	\$1,194,130	\$1,048,842	\$54,382	\$84,926	240	0.00837	0.00084	\$433	1-1-85	36	\$22,840	\$7,428	
Sub-Total	\$1,194,130	\$1,048,842	\$54,382	\$84,926				\$433			\$22,840	\$7,428	
CLEARING, GRADING AND BASIC DRAINAGE													
Original Grading	\$1,540,292	\$498,072	\$349,187	\$133,083	240	0.00734	0.00041	\$4,137	11-1-83	36	\$148,932	\$49,944	
Miscellaneous	\$11,785	—	—	\$11,785	240	0.00734	0.00041	\$92	11-1-83	36	\$3,312	\$1,104	
ADDITIONS													
1. Grading	\$2,742,997	\$1,103,441	\$807,903	\$831,653	240	0.00734	0.00041	\$4,409	1-1-74	36	\$237,924	\$79,308	
2. Fencing	\$44,537	\$12,933	\$11,133	\$32,489	120	0.01214	0.00084	\$421	1-1-75	12	\$3,052	\$1,484	
3. Seeding and Landscaping	\$100,124	\$57,940	\$12,150	\$30,124	240	0.00954	0.00041	\$100	1-1-75	36	\$7,100	\$1,400	
Sub-Total	\$4,521,847	\$1,872,358	\$1,200,373	\$1,449,126				\$11,459			\$401,410	\$134,148	
ELECTRICAL DISTRIBUTION SYSTEM													
additions To System	\$3,444	—	—	\$3,444	240	0.00954	0.00084	\$34	1-1-74	36	\$1,794	\$432	
Underground Power Lines	\$84,313	—	—	\$84,313	240	0.00954	0.00084	\$477	1-1-87	36	\$11,372	\$10,324	
Sub-Total	\$87,757	—	—	\$87,737				\$913			\$13,166	\$10,956	
EMERGENCY EQUIPMENT BUILDING													
Original Installation	\$43,341	\$19,874	\$9,940	\$13,527	240	0.00837	0.00084	\$142	1-1-83	—	\$0	\$0	
Relocation of Building	\$199,340	\$189,431	\$14,949	\$14,949	240	0.00837	0.00084	\$138	7-1-84	36	\$4,140	\$1,380	
Sub-Total	\$244,310	\$189,435	\$24,929	\$30,376				\$280			\$4,140	\$1,380	
PLANNING SERVICE													
Revelation Of Master Plan	\$43,041	—	—	\$43,041	120	0.01214	0.00084	\$1,008	1-1-86	36	\$34,280	\$13,094	
Sub-Total	\$43,041	—	—	\$43,041				\$1,008			\$34,280	\$13,094	
RAINFALL SERVICE SYSTEM													
Power Lines	\$49,400	—	—	\$49,400	240	0.00772	0.00084	\$423	11-1-83	36	\$13,308	\$3,180	
addition Lines	\$134,300	—	—	\$134,300	240	0.00772	0.00041	\$1,291	1-1-74	36	\$44,474	\$13,492	
addition Equipment	\$14,474	—	—	\$14,474	240	0.00954	0.00084	\$172	1-1-74	36	\$4,192	\$1,064	
Power Lines (C-123) 1985	\$104,000	—	—	\$104,000	240	0.00772	0.00084	\$1,744	1-1-85	36	\$43,854	\$10,952	
Sub-Total	\$402,174	—	—	\$402,174				\$3,434			\$138,824	\$43,688	

KENT COUNTY DEPARTMENT OF AERONAUTICS EXHIBIT 2
 AVERAGE ANNUAL CHANGE ATTRIBUTABLE TO DEPRECIABLE GENERAL PURPOSE INVESTMENT
 THREE YEARS BEGINNING JANUARY 1, 1967

Revenue Producing Assets And Direct Depreciable Investment Therein (1)	Total Cost (2)	INVESTMENTS		Net Per Rate Base (3)	Useful Life (No's) (4)	Interest & Amort @ 6% (7)	ANNUALLY CARRYING CHARGES		Total Dollars (9)	Use Began Or Expired On (10)	3 YEARS BEGINNING 1-1-66 CARRYING CHARGES		
		Subventions Fed. Aid (3)	State Aid (4)				Periodic Maintenance (8)	Months In Use (11)			Total (12)	Average (13)	
WATER SYSTEM													
Pumphouse	\$19,992	\$0,192	\$0,173	\$7,626	300	0.00772	0.00000	\$43	\$19,992	11-1-63	36	\$1,940	\$788
Water Lines	\$62,736	\$13,973	\$7,113	\$11,648	300	0.00772	0.00001	\$176	\$62,736	11-1-63	36	\$6,336	\$1,113
Completed Additions - Lines	\$190,497	\$3,711	\$1,876	\$184,992	300	0.00772	0.00002	\$1,305	\$190,497	1-1-74	36	\$54,188	\$18,848
C-113 Modify Water Building	\$21,648	—	—	\$21,648	300	0.00772	0.00002	\$176	\$21,648	1-1-83	36	\$6,336	\$1,113
Sub-Total	\$274,883	\$13,887	\$13,160	\$133,836				\$1,972				\$68,192	\$23,864
GRAND TOTALS	\$7,963,851	\$7,844,420	\$1,333,336	\$1,766,193				\$13,379				\$423,000	\$174,000

KENT COUNTY DEPARTMENT OF AERONAUTICS
DISTRIBUTION OF REVENUE PRODUCING AREA OF AVERAGE ANNUAL CHARGES
ATTRIBUTABLE TO INVESTMENTS IN LAND
THREE YEARS BEGINNING JANUARY 1, 1987

EXHIBIT 6

REVENUE PRODUCING AREAS		BASIS					E	GRAND TOTAL
		A	B	C	D			
(1)								
1. LANDING AREA								
A.	Runways and Taxiways	\$136,257	\$4,934	\$0	\$990	\$0	\$142,181	
B.	Passenger Terminal Apron	\$6,061	\$219	\$0	\$44	\$0	\$6,324	
C.	Freight Terminal Apron	\$64	\$2	\$0	\$1	\$0	\$67	
Sub Total		\$142,382	\$5,155	\$0	\$1,035	\$0	\$148,572	
2. PASSENGER TERMINAL BUILDING								
Sub Total		\$737	\$27	\$819	\$27	\$466	\$2,076	
		\$737	\$27	\$819	\$27	\$466	\$2,076	
3. PUBLIC AUTO PARKING								
a.	Passenger Terminal	\$1,326	\$48	\$1,489	\$50	\$847	\$3,760	
b.	Unit Storage Hangars	\$400	\$14	\$447	\$15	\$254	\$1,130	
Sub total		\$1,726	\$62	\$1,936	\$65	\$1,101	\$4,890	
4. FREIGHT TERMINAL BUILDING								
Sub Total		\$84	\$3	\$99	\$4	\$56	\$246	
		\$84	\$3	\$99	\$4	\$56	\$246	
5. AIRCRAFT PARKING AND TIE DOWN								
A.	Airline Aircraft - Paved	\$400	\$14	\$459	\$15	\$261	\$1,149	
B.	General Aviation - Paved	\$400	\$14	\$459	\$15	\$261	\$1,149	
C.	General Aviation - Unpaved	\$737	\$27	\$819	\$27	\$466	\$2,075	
Sub Total		\$1,536	\$55	\$1,737	\$57	\$588	\$4,373	
6. AVIATION FUEL STORAGE								
Sub Total		\$842	\$30	\$955	\$32	\$544	\$2,403	
		\$842	\$30	\$955	\$32	\$544	\$2,403	
7. FIXED BASE OPERATORS								
a.	Northern Air/AMR	\$1,515	\$55	\$1,700	\$40	\$967	\$4,277	
B.	Grand Aero Flight Center	\$1,157	\$42	\$1,315	\$31	\$748	\$3,293	
C.	Sparta Aviation	\$274	\$20	\$620	\$30	\$353	\$1,297	
Sub Total		\$2,946	\$117	\$3,635	\$101	\$2,068	\$8,867	
8. RENTAL BUILDINGS								
A.	Car Rental Bldg. #1	\$189	\$7	\$211	\$7	\$120	\$534	
B.	Car Rental Bldg. #2	\$189	\$7	\$211	\$7	\$120	\$534	
C.	Car Rental Bldg. #3	\$189	\$7	\$211	\$7	\$120	\$534	
D.	Car Rental Bldg. #4	\$189	\$7	\$211	\$7	\$120	\$534	
E.	Motel	\$821	\$30	\$931	\$31	\$529	\$2,342	
Sub Total		\$1,577	\$58	\$1,775	\$59	\$1,009	\$4,478	
9. OTHER RENTABLE LAND								
SUB TOTAL		\$58,606	\$2,113	\$0	\$0	\$37,376	\$98,095	
		\$58,606	\$2,113	\$0	\$0	\$37,376	\$98,095	
GRAND TOTALS		\$210,436	\$7,620	\$10,956	\$1,380	\$43,608	\$274,000	

EXPLANATORY NOTES

1. BASIS A INCLUDES ITEMS 1, 3, 6 AND 8 IN EXHIBIT 5 AND IS DISTRIBUTED ON REVENUE ACREAGE.
2. BASIS B INCLUDES ITEM 2 IN EXHIBIT 5 AND IS DISTRIBUTED ON DIRECT DEPRECIABLE INVESTMENT.
3. BASIS C INCLUDES ITEM 4 IN EXHIBIT 5 AND IS DISTRIBUTED ON REVENUE ACREAGE EXCLUDING THE LANDING AREA AND OTHER RENTABLE LAND.
4. BASIS D INCLUDES ITEM 5 IN EXHIBIT 5 AND IS DISTRIBUTED 75% TO THE LANDING AREA AND 25% ON DIRECT DEPRECIABLE INVESTMENT.
5. BASIS E INCLUDES ITEM 7 IN EXHIBIT 5, AND IS DISTRIBUTED ON REVENUE ACREAGE EXCLUDING THE LANDING AREA.

EXHIBIT 7

WEST COUNTY DEPARTMENT OF AGRICULTURE EXHIBIT 7
DEVELOPMENT OF REVENUE - PRODUCTION AREAS OF ANNUAL CARRYING
CHARGES AFTER/AVAILABLE TO REPLACEMENT INVESTMENTS IN INDIVIDUAL FACILITIES
THREE YEARS BEGINNING JANUARY 1, 1967

2025 FISCAL YEAR ENDING JANUARY 1, 1967						MONTHLY CARRYING CHARGES					CARRYING CHARGES 3 YEARS BEGINNING 1-1-66		
Revenue Producing Areas And Street Depreciable Leasehold Interests	Total Cost	INVESTMENT		Net Per Rate Base	Useful Life (Yrs)	RATES			Total Dollars	Begins On	CARRYING CHARGES		
		Federal Aid	State Aid			Interest & Amort @ 6%	Periodic Maintenance	Months In Use			Total	Average	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	
LANDING AREA, SEWERAGE AND TAXIDAYS													
Taxway Parking	\$31,663.00	\$13,099.00	\$14,317.00	\$14,317.00	240	0.00037	0.00042	\$134	9-1-66	36	\$1,304	\$740	
Access Taxway Parking	\$13,340.00	\$9,341.00	\$9,916.00	\$7,301.00	240	0.00037	0.00042	\$64	11-1-66	36	\$1,304	\$740	
Runway & Taxway Parking C-14	\$3,330,300.00	\$1,633,340.00	\$794,870.00	\$799,870.00	240	0.00037	0.00042	\$7,831	1-1-76	36	\$131,114	\$46,373	
Runway & Taxway Lighting	\$419,823.00	\$221,332.00	\$93,101.00	\$106,090.00	120	0.00934	0.00042	\$1,103	1-1-76	36	\$19,700	\$13,134	
Relocation Of Localizer	\$39,333.00	\$19,413.00	\$9,904.00	\$9,914.00	240	0.00037	0.00042	\$90	1-1-76	36	\$1,340	\$1,000	
Overlay 18-34	\$123,180.00	\$101,441.00	\$11,370.00	\$11,349.00	240	0.00037	0.00042	\$100	4-1-61	36	\$1,600	\$1,194	
Extend Runway 14-148	\$4,071,150.00	\$4,830,410.00	\$217,003.00	\$913,133.00	240	0.00037	0.00042	\$8,044	1-1-61	36	\$209,504	\$94,310	
Relocate Thermopile River Dr.	\$471,049.00	\$131,090.00	-	\$140,139.00	240	0.00037	0.00042	\$1,133	1-1-61	36	\$44,332	\$14,704	
Fencing & ALS	\$30,091.00	\$43,011.00	-	\$3,010.00	120	0.00934	0.00042	\$31	1-1-61	36	\$1,673	\$424	
Electric Gates	\$41,300.00	\$73,143.00	-	\$4,144.00	120	0.01714	0.00042	\$104	1-1-61	36	\$1,014	\$1,171	
Fencing 244	\$33,014.00	\$47,314.00	-	\$3,310.00	120	0.00934	0.00042	\$33	1-1-61	36	\$1,900	\$440	
Fencing South Property Line	\$44,101.00	\$41,374.00	-	\$4,610.00	120	0.00934	0.00042	\$44	1-1-61	36	\$1,710	\$374	
Barbwire (Not Runway)	\$930.00	-	-	\$930.00	240	0.00037	0.00042	\$8	1-1-61	36	\$100	\$94	
Fence 08	\$174,449.00	\$134,004.00	\$4,811.00	\$4,873.00	120	0.00934	0.00042	\$91	1-1-61	36	\$1,374	\$1,093	
Grass 14-148	\$123,794.00	\$111,414.00	\$4,190.00	\$4,190.00	120	0.01214	0.00042	\$70	1-1-61	36	\$1,000	\$914	
View Fillets C-14	\$384,447.00	\$147,002.00	\$19,333.00	\$19,332.00	240	0.00037	0.00042	\$170	11-1-63	36	\$4,130	\$1,040	
Taxway Hold Signs C-31	\$134,394.00	\$119,935.00	\$11,710.00	\$11,710.00	120	0.00934	0.00042	\$123	1-1-66	36	\$4,392	\$1,444	
View Taxway Fillets C-14	\$178,734.00	\$133,499.00	\$200.00	\$14,039.00	240	0.00037	0.00042	\$140	1-1-66	36	\$3,314	\$1,774	
C-14 Extend Taxway "V" (1966)	\$3,314,914.00	\$3,143,432.00	-	\$231,482.00	240	0.00037	0.00042	\$3,000	1-1-66	36	\$113,340	\$37,000	
Fire access Roads (1964)	\$144,091.00	\$130,223.00	-	\$14,449.00	240	0.00037	0.00042	\$127	1-1-66	36	\$4,371	\$1,534	
C-14 Overlay Runway 14/748 & Taxway "J" 1966	\$444,979.00	\$440,001.00	\$14,444.00	\$14,450.00	240	0.00037	0.00042	\$713	1-1-66	36	\$7,740	\$1,500	
C-19 Taxway & Runway Lighting (1967)	\$78,119.00	\$70,397.00	\$3,910.00	\$3,912.00	120	0.00934	0.00042	\$40	1-1-67	36	\$1,440	\$400	
C-70 Taxway & Runway Lighting (1967)	\$100,443.00	\$90,417.00	-	\$10,044.00	120	0.00934	0.00042	\$104	1-1-67	36	\$1,744	\$1,240	
C-71 Runway Sensor System (1967)	\$104,743.00	\$43,307.00	-	\$109,474.00	120	0.00934	0.00042	\$1,129	1-1-67	36	\$4,004	\$13,040	
Sub-Total	\$14,401,309.00	\$12,471,301.00	\$1,334,005.00	\$1,409,003.00				\$13,391			\$437,540	\$179,180	
LANDING AREA-FACILITIES & PRE TERMINAL APRON													
Apron Parking C-14 C-33	\$140,371.00	\$100,313.00	\$140,104.00	\$140,134.00	240	0.00037	0.00042	\$1,123	1-1-76	36	\$44,300	\$14,794	
Apron Lighting	\$49,334.00	\$44,642.00	-	\$44,642.00	120	0.00934	0.00042	\$43	1-1-76	36	\$14,740	\$5,500	
Expend East Ramp C-33	\$1,319,614.00	\$1,187,474.00	\$14,134.00	\$113,914.00	240	0.00037	0.00042	\$1,018	1-1-66	36	\$34,440	\$13,534	
Lighting -C 34	\$178,429.00	\$160,393.00	-	\$17,044.00	120	0.00934	0.00042	\$100	1-1-66	36	\$4,000	\$1,171	
West Ramp Expansion	\$444,001.00	\$419,497.00	\$22,347.00	\$34,007.00	240	0.00037	0.00042	\$211	1-1-66	36	\$7,304.00	\$3,531.00	
C-70 Apron Parking-West (1967)	\$1,794,393.00	\$1,143,134.00	\$29,439.00	\$99,419.00	240	0.00037	0.00042	\$477	1-1-67	36	\$31,375.00	\$14,334.00	
C-70 Apron Lighting-West (1967)	\$13,122.00	\$11,629.00	-	\$1,513.00	120	0.00934	0.00042	\$14	1-1-67	36	\$936.00	\$313.00	
C-74 Electric Gates (1967)	\$11,478.00	\$10,313.00	-	\$1,167.00	60	0.07403	0.00042	\$40	1-1-67	36	\$1,734.00	\$374.00	
Sub-Total	\$11,954,914.00	\$11,000,434.00	\$100,114.00	\$447,144.00				\$4,000			\$144,304.00	\$44,740.00	

JOINT COUNTY DEPARTMENT OF ADMINISTRATION SUMMARY ?
DEVELOPMENT OF REVENUE - PASSENGER AREAS OF AIRPORT CAMERONS
CHARGES ATTRIBUTABLE TO REPLICABLE IMPROVEMENTS IN INDIVIDUAL FACILITIES
THREE YEARS BEGINNING JANUARY 1, 1967

Page 4 of 4

Revenue Producing Areas And Direct Depreciable Improvements Therein (1)	EXPENSES			REVENUE CHARGES				CARRYING CHARGES				
	Total Cost (2)	Deductions Fed. Aid (3)	State Aid (4)	Net Per Rate Base (5)	Useful Life (Yrs.) (6)	Interest & Amort @ 6% (7)	Periodic Maintenance (8)	Total Dollars (9)	Began On Begining On (10)	Months In Use (11)	Total (12)	Average (13)
PASSENGER TERMINAL BUILDING												
A. Original Terminal Building	\$1,686,787	—	—	\$1,686,787	360	0.00736	0.00000	\$12,781	11-1-63	36	\$496,116	\$143,372
B. Terminal Building Addition	\$2,371,500	—	—	\$2,371,500	360	0.00736	0.00000	\$21,935	1-1-76	36	\$757,560	\$213,240
C. Terminal Building Porling	\$236,311	—	—	\$236,311	360	0.00837	0.00000	\$2,199	1-1-76	36	\$79,166	\$24,380
D. Ticket Wing Expansion	\$90,591	—	—	\$90,591	360	0.00736	0.00000	\$761	12-1-78	36	\$26,676	\$8,095
E. Recarpet Terminal Building	\$148,445	—	—	\$148,445	120	0.01214	0.00000	\$1,873	1-1-67	36	\$63,438	\$17,876
F. Terminal Building Addition (C-62)	\$4,471,000	\$1,297,836	—	\$3,173,164	360	0.00736	0.00000	\$23,878	1-1-67	36	\$856,958	\$231,640
G. Gate Lobby Furniture (B-3, B-4)	\$34,466	—	—	\$34,466	60	0.0193	0.00000	\$771	1-1-67	36	\$27,756	\$7,121
H. Baggage Cartons #3 (C-62)	\$90,800	\$45,100	—	\$45,100	120	0.01214	0.00000	\$566	1-1-67	36	\$21,896	\$7,072
I. Signs (C-62)	\$243,488	\$71,843	—	\$171,645	120	0.01214	0.00000	\$933	1-1-67	36	\$33,332	\$11,186
J. Terminal Area Seating				\$3,127	60	0.0193	0.00000	\$138	1-1-67	36	\$3,960	\$1,120
COMPLETED IMPROVEMENTS												
1. Restroom Modifications	\$7,817	—	—	\$7,817	360	0.00736	0.00000	\$66	10-1-60	36	\$2,386	\$746
2. Carpeting	\$23,000	—	—	\$23,000	96	0.01414	0.00000	\$273	4-1-61	36	\$13,360	\$4,500
3. Carpeting	\$14,969	—	—	\$14,969	96	0.01414	0.00000	\$223	9-1-61	36	\$8,100	\$2,700
4. Northwest Office Space	\$27,718	—	—	\$27,718	360	0.00736	0.00000	\$186	12-1-61	36	\$6,696	\$2,121
5. Office Space in Ticket Wing	\$7,430	—	—	\$7,430	360	0.00837	0.00000	\$132	12-1-62	36	\$1,153	\$366
6. New Room Carpet Installation	\$4,300	—	—	\$4,300	96	0.01414	0.00000	\$83	1-1-63	36	\$1,348	\$380
7. Communion a. Office	\$3,326	—	—	\$3,326	360	0.00837	0.00000	\$69	12-1-62	36	\$1,766	\$505
Sub-Total	\$9,543,160	—	—	\$9,543,160				\$46,766			\$1,481,966	\$417,328
PASSENGER TERMINAL OUTSIDE-PASSENGER PREMISES												
Additions To Original Equipment	\$379,727	—	—	\$379,727	360	0.00837	0.00000	\$1,087	1-1-76	36	\$123,892	\$41,966
Exhaust System Kitchen	\$7,830	—	—	\$7,830	360	0.00837	0.00000	\$73	9-1-61	36	\$1,618	\$476
Sub-Total	\$387,557	—	—	\$387,557				\$1,160			\$125,510	\$42,442
PUBLIC AREA PARKING - PASSENGER TERMINAL												
Paving	\$114,586	—	—	\$114,586	360	0.00837	0.00000	\$1,087	1-1-76	36	\$16,123	\$12,086
Lighting	\$23,730	—	—	\$23,730	180	0.00950	0.00000	\$126	1-1-76	36	\$8,586	\$1,671
Maneuvering	\$8,131	—	—	\$8,131	360	0.00837	0.00000	\$73	1-1-76	36	\$3,392	\$866
Ground Addition To Parking Lot	\$207,816	—	—	\$207,816	360	0.00837	0.00000	\$1,426	12-1-78	36	\$48,758	\$13,913
Employee Parking Lot	\$196,713	—	—	\$196,713	360	0.00837	0.00000	\$1,713	11-1-60	36	\$43,422	\$18,366
Overflow Parking Lot	\$205,115	—	—	\$205,115	360	0.00837	0.00000	\$1,886	12-1-63	36	\$46,566	\$13,660
C-123 180 Car Expansion Paving	\$109,788	—	—	\$109,788	360	0.00837	0.00000	\$979	1-1-65	36	\$23,666	\$12,148
C-123 Lights For 180 Car	\$4,000	—	—	\$4,000	120	0.00950	0.00000	\$61	1-1-65	36	\$1,676	\$495
C-127 Expanded East Lot Paving	\$214,862	—	—	\$214,862	360	0.00837	0.00000	\$1,957	12-1-65	36	\$44,422	\$17,486
C-127 Expanded East Lot Lighting	\$28,422	—	—	\$28,422	180	0.00950	0.00000	\$116	12-1-65	36	\$18,386	\$6,166
C-129 Toll Booth & Equipment	\$12,000	—	—	\$12,000	120	0.01214	0.00000	\$156	12-1-65	36	\$3,618	\$1,671
C-43 1967 Male Parking	\$1,879,300	—	—	\$1,879,300	360	0.00837	0.00000	\$9,110	1-1-67	36	\$238,768	\$113,990
C-128 1965 Expanded East Lot	\$99,380	—	—	\$99,380	360	0.00837	0.00000	\$873	1-1-65	36	\$21,428	\$18,476
C-127 1968 Expanded East Lot	\$176,862	—	—	\$176,862	360	0.00837	0.00000	\$2,796	1-1-66	36	\$110,586	\$39,120
C-48 Signs (1967)	\$26,470	—	—	\$26,470	120	0.00736	0.00000	\$660	1-1-67	36	\$16,856	\$5,102
Sub-Total	\$2,817,636	—	—	\$2,817,636				\$24,377			\$962,972	\$313,386

JOINT CHIEF OF STAFF DEPARTMENT OF AERONAUTICS
DEVELOPMENT OF REVENUE - FUNDING AREAS OF AIRMAIL CARRIER
CHARGES ATTRIBUTABLE TO SUSPICABLE EXPENDITURES IN INDIVIDUAL FACILITIES
THREE YEARS BEGINNING JANUARY 1, 1967

PAGE 3 OF 4

THREE YEARS BEGINNING JANUARY 1, 1967				PROPERTY CARRIER CHARGES							3 YEARS BEGINNING 1-1-66 CARRIER CHARGES		
Revenue Producing Areas And Direct Depreciable Investment Thesis	Total Cost	Expenditures Pub. Aid	State Aid	Net Per Rate Base	Goodwill Life (No's)	Interest & Amort. @ 6%	Periodic Maintenance	Total Dollars	Began On Engine On	Months In Use	Total	Average Annual	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	
(F) FREIGHT TERMINAL BUILDING (HOFER)													
A. Building	\$222,347	—	—	\$222,347	300	0.00772	0.00000	\$1,900	1-1-71	36	\$60,300	\$17,025	
B. Porling	\$12,347	—	\$12,831	\$17,406	340	0.00037	0.00000	\$123	1-1-71	36	\$5,300	\$1,472	
FREIGHT BUILDING (HOFER)													
C-124 Building (1963)	\$251,963	—	—	\$251,963	300	0.00772	0.00000	\$1,137	1-1-65	36	\$77,657	\$21,571	
C-124 Porling (1963)	\$96,374	—	—	\$96,374	340	0.00037	0.00000	\$647	1-1-65	36	\$30,495	\$8,471	
C-124 Lighting (1963)	\$12,399	—	—	\$12,399	100	0.00936	0.00000	\$129	1-1-65	36	\$4,044	\$1,123	
C-124 North Building	\$44,337	—	\$4,412	\$44,912	300	0.00772	0.00000	\$154	1-1-65	36	\$20,016	\$5,557	
Sub-Total	\$233,814	—	\$13,831	\$443,414				\$3,747			\$104,001	\$28,944	
(G) AIRCRAFT PARKING - PAYED AIRLINE AIRCRAFT													
A. Porling	\$193,093	\$97,481	\$48,741	\$48,871	340	0.00037	0.00000	\$430	1-1-74	36	\$13,400	\$3,722	
B. Addition													
Sub-Total	\$193,093	\$97,481	\$48,741	\$48,871				\$430			\$13,400	\$3,722	
(H) AIRCRAFT PDC - PAYED GEN AVIATION AIRCRAFT													
A. Porling	\$78,941	\$25,791	\$17,773	\$17,873	340	0.00037	0.00000	\$130	1-1-73	36	\$5,600	\$1,556	
B. Lighting	\$4,874	\$4,430	\$1,119	\$1,119	100	0.00936	0.00000	\$13	1-1-73	36	\$950	\$264	
C. C-48 Overlay Co. Agreements (1964)	\$100,449	\$343,602	\$19,833	\$19,836	340	0.00037	0.00000	\$167	1-1-67	36	\$4,813	\$1,337	
Sub-Total	\$400,404	\$369,121	\$39,917	\$39,120				\$340			\$12,323	\$4,174	
(I) AVIATION FUEL STORAGE AREA													
A. Completed Addition - Porling	\$12,043	—	\$4,172	\$4,091	340	0.00037	0.00000	\$41	1-1-74	36	\$2,194	\$610	
(J) F.B.S. - HENDERSON AIR SERVICE													
A. Original Installation-Porling	\$49,170	—	—	\$49,170	340	0.00037	0.00000	\$433	12-1-63	36	\$13,300	\$3,722	
B. Addition-Line Office	\$40,000	—	—	\$40,000	300	0.00772	0.00000	\$142	5-1-61	36	\$12,340	\$4,123	
C. Additional Unit Sengars													
1. Buildings	\$73,736	—	—	\$73,736	300	0.00772	0.00000	\$421	12-1-63	36	\$23,736	\$6,593	
2. Porling	\$73,603	—	—	\$73,603	340	0.00037	0.00000	\$440	12-1-63	36	\$14,906	\$4,143	
Sub-Total	\$236,001	—	—	\$236,001				\$2,003			\$45,282	\$12,581	
(K) F.B.S. GRASS AND PLYWOOD CENTER													
A. Main Sengars	\$344,441	—	—	\$344,441	300	0.00772	0.00000	\$3,121	1-1-73	36	\$133,334	\$37,037	
B. Main Sengars Porling	\$112,409	—	—	\$112,409	340	0.00037	0.00000	\$990	1-1-73	36	\$35,040	\$9,733	
C. Unit Sengars	\$173,423	—	—	\$173,423	300	0.00772	0.00000	\$1,301	1-1-73	36	\$24,000	\$6,667	
D. Unit Sengars - Porling	\$100,730	—	—	\$100,730	340	0.00037	0.00000	\$403	1-1-73	36	\$21,000	\$5,833	
Sub-Total	\$731,303	—	—	\$731,303				\$4,915			\$193,374	\$53,270	

KING COUNTY DEPARTMENT OF AERONAUTICS EXHIBIT 7
DEVELOPMENT OF REVENUE - PRODUCING AREAS OF AIRPORT CARRIAGE
CHARGES ATTRIBUTABLE TO DEPRECIABLE INVESTMENTS IN INDIVIDUAL FACILITIES
THREE YEARS BEGINNING JANUARY 1, 1967

CARRIAGE CHARGES												
3 YEARS BEGINNING 1-1-66												
CARRIAGE CHARGES												
MONTHLY CARRIAGE CHARGES												
CARRIAGE CHARGES												
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EXHIBIT 9

East Coast Department of Aeronautics
Prospective Expenses of Operations Maintenance and Administration
Their Distribution by Revenue. Predominant Cost Areas
Three Years Beginning January, 1948

Exhibit 9

Item	Landing Area					Passenger Terminal Bldg.	Public Passenger Terminal	Parking Unit Bldg.	Freight Terminal Bldg.	Fuel Gen. Avia.	Repaired Gen. Avia.	Aviation Pool Storage	720 Barbers Air	Operations Grand Avia.	Sports	Rental Car	Bldg. Hotel	Other Rentable Land
	Total Amount	Runway & Taxiways	Per. Term Apron	Freight Term Apron	Total													
8) Lighting Supplies	\$12,888.00	\$4,571.00	\$789.00		\$7,308.00	\$4,571.00	\$246.00		\$107.00									
9) Other Supplies	\$47,888.00	\$27,738.00	\$2,513.00		\$30,250.00	\$22,797.00	\$2,171.00		\$795.00	\$304.00	\$304.00		\$195.00					
10) Equipment Repairs and Maint.	\$48,888.00					\$24,791.00	\$2,365.00											
11) Vehicle Repairs and Maint.	\$188,888.00	\$41,798.00	\$14,388.00	\$788.00	\$78,974.00		\$4,488.00	\$2,488.00		\$2,488.00	\$2,388.00		\$7,888.00	\$12,888.00	\$7,888.00		\$878.00	
12) Janitorial Supplies	\$12,888.00					\$11,488.00				\$488.00								
13) Vehicle Operating Supplies	\$888.00	\$138.00	\$138.00	\$1.00	\$432.00		\$11.00	\$28.00		\$18.00	\$42.00			\$16.00	\$16.00	\$16.00		\$4.00
14) Firefighting Supplies	\$4,888.00	\$1,258.00	\$448.00	\$9.00	\$4,300.00	\$219.00	\$13.00	\$13.00	\$13.00	\$18.00	\$29.00		\$4.00	\$138.00	\$40.00	\$40.00	\$133.00	\$174.00
15) Gas, Oil and Grease \$7,888 less retab. \$8,888	\$17,888.00	\$13,943.00	\$4,827.00	\$78.00	\$18,840.00		\$341.00	\$943.00		\$943.00	\$1,941.00			\$734.00	\$734.00	\$734.00		\$388.00
16) Salaries - 6400 Less Finance - 1500 A) Safety Officers B) Maintenance C) Packing Lot	\$7,388.00 \$1,388.00 \$488.00	\$114.00 \$114.00 \$488.00	\$144.00 \$144.00 \$488.00	\$51.00 \$51.00 \$488.00	\$331.00 \$1,339.00 \$738.00	\$1,339.00 \$738.00 \$488.00	\$22.00 \$243.00 \$488.00	\$11.00 \$13.00 \$488.00	\$13.00 \$17.00 \$14.00				\$3.00 \$44.00 \$33.00	\$33.00 \$33.00 \$33.00	\$33.00 \$33.00 \$33.00	\$21.00 \$21.00 \$21.00	\$27.00 \$27.00 \$27.00	
Sub-Total	\$4,188.00	\$114.00	\$144.00	\$51.00	\$331.00	\$1,339.00	\$1,167.00	\$11.00	\$13.00	\$17.00	\$14.00		\$3.00	\$44.00	\$33.00	\$33.00	\$21.00	\$27.00
17) Repairs and Maint. Airfield	\$48,888.00	\$14,488.00	\$4,888.00	\$4,888.00	\$48,888.00													
18) Rentals of Equipment	\$3,888.00					\$4,888.00	\$488.00											
19) Employees Training and Improv.	\$4,888.00	\$281.00	\$299.00	\$188.00	\$488.00	\$1,798.00	\$48.00	\$28.00	\$43.00	\$13.00	\$25.00		\$3.00	\$118.00	\$39.00	\$39.00	\$13.00	\$133.00
20) Taxes - Other	\$1,188.00					\$1,188.00												
21) Refunds	\$288.00					\$288.00												
22) Insurance	\$17,888.00	\$184,491.00	\$13,388.00	\$4,821.00	\$134,988.00	\$38,187.00	\$1,977.00	\$288.00	\$43.00	\$487.00	\$1,131.00			\$11,139.00	\$3,438.00	\$3,438.00	\$84.00	\$13,688.00
23) Total Direct Expenses	\$1,179,434.00	\$337,139.00	\$111,988.00	\$19,374.00	\$478,723.00	\$1,858,411.00	\$289,113.00	\$13,888.00	\$3,799.00	\$13,488.00	\$14,344.00	\$8.35	\$473.00	\$33,338.00	\$18,397.00	\$13,394.00	\$2,439.00	\$31,826.00
Allowance For Replacement																		
1) Vehicles	\$79,871.00	\$11,414.00	\$3,324.00	\$38.00	\$14,571.00		\$1,344.00	\$337.00	\$329.00		\$1,844.00			\$483.00	\$381.00	\$381.00		\$144.00
2) Other Buildings & Equipment	\$7,398.00	\$1,888.00	\$257.00	\$3.00	\$2,571.00	\$4,973.00	\$4.00											
3) Furnishings	\$38,321.00					\$38,321.00												
Total Allowance For Replacement	\$125,589.00	\$13,302.00	\$3,581.00	\$41.00	\$17,142.00	\$43,967.00	\$1,348.00	\$337.00	\$332.00		\$1,844.00			\$483.00	\$381.00	\$381.00		\$144.00
GRAND TOTAL	\$1,305,023.00	\$350,441.00	\$115,569.00	\$19,415.00	\$495,865.00	\$1,902,378.00	\$290,461.00	\$14,225.00	\$4,131.00	\$15,332.00	\$16,188.00	\$8.35	\$946.00	\$33,719.00	\$18,778.00	\$13,775.00	\$2,483.00	\$31,970.00

East County Department of Aeronautics
Prospective Expenses of Operations Maintenance and Administration
Their Distribution by Revenue Producing Cost Areas
Three Years Beginning January, 1968

Exhibit 9

East County Department of Aeronautics
Prospective Expenses of Operations Maintenance and Administration
Their Distribution by Revenue Producing Cost Areas
Three Years Beginning January, 1968

Item	Total Amount	Landing Area Runway & Taxiways	Pass. Term Apron	Freight Term Apron	Total	Passenger Terminal Bldg.	Public Passenger Terminal	Parking Unit Bldg.	Freight Terminal Bldg.	Airline	Fixed Con. Avia.	Unfixed Con. Avia.	Aviation Fuel Storage	FBO Barbers Air	Operations Grand Aero.	Rental Car Rental	Bldg. Rental	Other Rentable Land
Direct Expenses																		
1) Salaries and Wages																		
A) Maintenance	\$307,571.00	\$133,947.00	\$37,431.00	\$444.00	\$172,094.00	\$80,820.00	\$14,404.00	\$5,305.00		\$4,123.00	\$11,933.00			\$4,920.00	\$1,475.00	\$3,474.00		\$1,900.00
B) Parking Attendants	\$134,390.00						\$134,390.00											
C) Airport Safety	\$111,527.00	\$10,374.00	\$15,045.00	\$5,380.00	\$31,799.00	\$140,000.00	\$1,411.00	\$1,050.00	\$1,300.00	\$1,700.00	\$1,333.00		\$112.00	\$7,747.00	\$4,801.00		\$1,019.00	\$8,140.00
D) Fireman																		
Sub-Total	\$453,488.00	\$144,321.00	\$53,296.00	\$5,924.00	\$203,733.00	\$220,820.00	\$153,795.00	\$6,355.00	\$2,300.00	\$7,823.00	\$13,266.00		\$112.00	\$14,667.00	\$6,276.00	\$3,474.00	\$1,819.00	\$9,739.00
2) Side Benefits																		
A) Maintenance	\$40,718.00	\$29,931.00	\$8,364.00	\$144.00	\$38,439.00	\$17,083.00	\$3,404.00	\$1,130.00		\$1,368.00	\$2,647.00			\$1,344.00	\$777.00	\$774.00		\$350.00
B) Parking Attendants	\$32,737.00						\$32,737.00											
C) Airport Safety	\$53,831.00	\$1,093.00	\$4,039.00	\$1,344.00	\$8,476.00	\$37,404.00	\$434.00	\$160.00	\$410.00	\$450.00	\$339.00		\$34.00	\$1,974.00	\$611.00	\$611.00	\$443.00	\$1,073.00
D) Fireman																		
Sub-Total	\$127,286.00	\$31,024.00	\$12,403.00	\$2,792.00	\$46,219.00	\$54,491.00	\$37,835.00	\$1,699.00	\$410.00	\$1,818.00	\$3,004.00		\$34.00	\$3,312.00	\$1,388.00	\$1,387.00	\$443.00	\$2,431.00
3) Gas																		
A) For Heat & Air Conditioning	\$155,400.00					\$155,400.00												
173.000 Less -17.600 Reimb. Town																		
4) Electricity																		
A) Public Use	\$119,000.00	\$17,730.00	\$4,953.00	\$60.00	\$22,743.00	\$181,254.00	\$12,400.00	\$131.00		\$348.00	\$718.00			\$414.00	\$109.00	\$109.00		\$94.00
390.500 Less Reimb. 190.000																		
+19,500 Maint.																		
5) Water & Sewage																		
A) Purchase	\$18,000.00					\$18,000.00												
B) Repairs	\$7,423.00					\$7,423.00												
Sub-Total	\$25,423.00					\$25,423.00												
6) Service Contracts																		
Other Contract Services	\$273,490.00					\$207,030	\$45,460											
						\$0.00	\$0.00											
Less Reimb. Janitorial																		
Airline	43,079.74																	
Town	9,500.01																	
Hot'l Weather	2,130.00																	
G.A.B.O.	5,600.00																	
7) Building Repairs and Maint.	\$130,000.00	\$30,736.00	\$1,064.00		\$40,800.00	\$47,300.00	\$4,000.00	\$2,400.00		\$94.00	\$434.07			\$400.00				\$1,040.00

Exhibit 9

East County Department of Aeronautics
 Prospective Expenses of Operations Maintenance and Administration
 Their Distribution by Revenue, Producing Cost Areas
 Three Years Beginning January, 1968

Item	Total Amount	Landing Area		Passenger Terminal Bldg.	Public Passenger Terminal	Parking Unit Bldg.	Freight Terminal Bldg.	Airline	Fixed Gen. Avia.	Unfixed Gen. Avia.	Aviation Fuel Storage	FBO Bldg.	Operations Grand Avia.	Sports	Rental Car Bldg.	Bldg. Total	Other Buildings Land
		Runway & Taxiways	Pass. Term Apron														
Administrative Expenses																	
1) Salaries and Wages	\$221,000.00																
2) Sickness Benefits	\$40,300.00																
3) Printing	\$13,000.00																
4) Postage	\$3,300.00																
5) Telephone	\$25,000.00																
6) Travel	\$37,000.00																
7) Per Diem	\$3,000.00																
8) Legal & Professional																	
A. Retainer & Consultants	\$40,000.00																
B. Annual Audit	\$8,500.00																
Sub-Total	\$48,500.00																
9) Memberships & Subscriptions	\$4,900.00																
10) Service Contracts & Other Const. Serv.	\$80,700.00																
11) Equipment Repairs & Maint. & Comp.	\$4,000.00																
12) Office Supplies	\$6,000.00																
13) Gas, Oil and Grease	\$7,000.00																
14) Taxes-Other	-0-																
15) Insurance	\$70,000.00																
16) Allowance for Replacement																	
A) Licenses and Unlicensed Vehicles	-0-																
B) Office Furniture & Equipment	\$7,500.00																
17) Other Supplies	\$4,500.00																
18) Rentals of Equipment	-0-																
19) Employees' Training & Improvement	\$500.00																
20) TOTAL ADMINISTRATIVE EXPENSES	\$718,314.00	\$154,325.00	\$20,643.00	\$3,304.00	\$199,304.00	\$301,074.00	\$77,200.00	\$3,018.00	\$1,900.00	\$4,105.00	\$10,550.00	\$100.00	\$107.00	\$10,743.00	\$4,934.00	\$1,349.00	\$0,703.00

PLAINTIFF'S EXHIBIT 20

RENTAL FEE RECOMMENDATIONS

JAMES C. BUCKLEY

FEBRUARY, 1969

**FEEs FOR THE USE OF PUBLIC
AIRCRAFT FACILITIES**

AND

**RENTAL FOR PASSENGER TERMINAL PREMISES,
FOR FREIGHT TERMINAL PREMISES,
FOR RENTABLE BUILDINGS,
AND FOR GROUND SPACE**

KENT COUNTY AIRPORT

From January 1, 1968 Through December 31, 1970

James C. Buckley, Inc.

Industrial and Transportation Consultants

30 East 40th Street

New York, N.Y.

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11. Assumed Responsibility of the Aeronautics Board (B) and Tenants (T) for Services and Maintenance in Rentable Buildings
12. Space To Be Provided in the Passenger Terminal Building

FEES FOR THE USE OF
PUBLIC AIRCRAFT FACILITIES
AND
RENTAL FOR PASSENGER TERMINAL PREMISES
KENT COUNTY AIRPORT

Three Years Beginning January 1, 1968

A. Structure and Level of Rates

On the basis of the analyses and the detailed discussion of rates, fees and rentals, presented in Sections B and C, inclusive, it is determined that during the three years beginning January 1, 1968, the landing fees and Passenger Terminal Building rentals at the Kent County Airport will be as follows:

1. For the use of the Landing Area:

- a. By aircraft of a scheduled airline, the appropriate fee for each departure, including the preceding landing, for revenue flights, expressed in terms of a rate per thousand pounds of maximum allowable gross weight of the aircraft for landing is:

\$0.1905

The above charge will include the right to use aircraft loading positions on the Passenger Terminal Apron. There will be no charge for a departure by such aircraft if neither the departure, nor the preceding landing, were for revenue.

- b. By civil non-airline aircraft having a maximum allowable gross weight for landing of 7,500 pounds or more, the appropriate fee

for each departure, including the preceding landing, is:

\$0.20

with a minimum for each such take-off of \$2.00

- c. By Air Taxi aircraft, the appropriate fee for each departure including the preceding landing, is:

\$0.35

The above charge will include the right to use an aircraft loading position on the Passenger Terminal Apron.

2. For space in the Passenger Terminal Building, the annual rental rates per square foot will be as follows:

Type of Space (1)	Rate per Square Foot (2)
Enclosed, air conditioned-finished	\$12.71
Enclosed, not AC-finished	9.15
Enclosed, not AC-utility finish	6.99
Open deck	1.27

The above rental rates are appropriate only under Agreements and Leases where the Board's responsibility for services does not exceed that shown in Exhibit 10. These rates will be firm and not affected by the volume or the value of the business done by the tenant, where the tenant is a scheduled airline authorized to provide service to Kent County.

In the case of other tenants, the Board will fix the rental rates at such levels, relative to the above, as may be required by the exercise of sound business judgement, including the establishment of minimum guarantees, with the actual rent determined by the minimum guarantee or by a percentage of the vol-

ume of the business done by the tenant, whichever is greater.

3. With respect to the public aircraft parking and tie-down space,

- A rate is established for the use of the paved airline aircraft parking space of 20 cents per thousand pounds of maximum allowable gross weight for landing for each eight hours, or fraction thereof with no free use of such area permitted.
- For paved aircraft parking area for general aviation, a rate of \$20 per month for aircraft based at the airport is established.
- For unpaved space for the parking and tie-down of general aviation aircraft, the following rates apply:

\$3.00 per month for aircraft based at the airport.

\$1.00 per day or fraction thereof for itinerant aircraft.

B. Fees for the Use of the Landing Area

The Landing Area at the airport is considered to include the runways and taxiways, the Passenger Terminal apron and the related land required to meet normal clearance requirements related thereto. The breakeven need for the Landing Area, as shown in Exhibit 1, is the sum of the breakeven need for the Runways and Taxiways, and for the Passenger Terminal Apron. This break-even need is as follows:

Annual Break-Even Need of the Landing Area

Landing Area Sub-Areas (1)	Annual Break-Even Need (2)
Runways and Taxiways	\$234,330
Passenger Terminal Apron	50,949
Total	\$285,279

The costs applicable to each of these sub-areas of the landing area have been accumulated separately because of the portion of their break-even need which should be allocated to each class of use will vary between them. Each will be discussed individually.

Passenger Terminal Apron Sub-Area

The landing positions at the Passenger Terminal Building have been designed primarily on the basis of the requirements of scheduled air carriers. Provision has been made, however, for the use of one of eight loading positions on the Passenger Terminal Apron by air taxis. Consequently, 88 percent of the break-even need of the Passenger Terminal Apron has been assigned to the scheduled air carrier, and the balance to air taxis.

Public Runways and Taxiways

The runways, and taxiways will be used by scheduled air carriers and by general aviation. The distribution of the break-even need of the runways and taxiways as between these types of users are based on a combination of the following factors:

1. The number of aircraft departures in relation to total aircraft departures.
2. The maximum allowable gross weight at take-off of aircraft departing the airport in relation to the maximum allowable gross weight at take-off of all aircraft departing the airport.

The use of aircraft departures to allocate runway and taxiways costs bases such an allocation on the airspace capacity, and hence runway capacity utilized.

The use of maximum allowable gross weight at take-off of aircraft lifted from the airport to allocate runway and taxiway costs gives recognition to the additional costs involved in the provision of airport facilities adequate to

handle large airline aircraft. It fails, however, to recognize the fact that airline operations are with heavy aircraft, and hence use up less airspace and runway capacity in relation to weight lifted than do non-airline civil aircraft operations.

It is considered necessary, therefore, to allocate runway and taxiway break-even need on the basis of a formula which gives dual weight both to aircraft departures and to the maximum allowable gross weight at take-off of aircraft lifted from the airport. To achieve such an allocation, forecasts have been made of prospective average annual departures by each type of airport user during the average maximum allowable gross weight at take-off of the aircraft in prospective use by each type of user. The results, from the standpoint of percentage distribution of runway and taxiway break-even needs are as follows:

Distribution of Break-Even Need for Runways and Taxiways

Type of Operation (1)	Average Annual Departures				Percent of Total	
	Number (2)	Weight		Total (M lbs.) (4)	Departures (5)	Weight (6)
		Average (lbs.) (3)				
1. Scheduled Airlines	11,500	85,000	977,500	17.22	81.09	49.15
2. Other Air Carrier	600	60,000	36,000	0.90	2.99	1.95
3. Air Taxis	1,700	8,500	14,450	2.54	1.20	1.87
4. General Aviation	53,000	3,350	177,550	79.36	14.75	47.05
5. Total	66,800	—	1,205,500	100.00	100.00	100.00

The Landing Area As A Whole

On the basis of the above discussions, it is possible to establish the total annual amount to be recovered from the various airport users and their respective fair shares of the break-even need of the Landing Area. To make this computation complete, it is necessary to add as an additional element in the break-even need of the runways and taxiways, the rental value of the space in the Terminal Building required to be made available to the Weather Bureau, at less than compensatory rate, for their use in connection with the operation of the runways and taxiways. No deduction will be made for the annual service fee which the Weather Bureau will pay on such space because no provision has been made in the O&M budget for the cost of such services. The resulting total break-even need for the Landing Area, and its distribution among users of the Landing Area, is as follows:

Distribution Among Landing Area Users of Landing Area Break-Even Need

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	Distribution Among Landing Area Users				
	Total Amount (2)	Scheduled Airlines (3)	Other Air Carrier (4)	Air Taxis (5)	General Aviation (6)
1. Break-Even need of the Passenger Terminal Apron	\$ 50,949	\$ 44,835	\$ —	\$ 6,114	\$ —
2. Break-Even need of the Runways and Taxiways	234,330	115,173	4,570	4,382	110,205
3. Rental value of space in the Terminal Building required to be given to the Weather Bureau at \$8.16 per square foot below the compensatory rate	11,114	5,462	217	208	5,227
Total	\$296,393	\$165,470	\$4,787	\$10,704	\$115,430

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On the basis of the above, the fee which is applicable to the use of the Landing Area by the scheduled airlines during the three years beginning January 1, 1968 is as follows:

1. The scheduled airlines' share of the break-even need of the Landing Area was found to be \$165,470
2. The prospective maximum allowable gross weight for landing of average annual revenue departures by airline aircraft in the rate-making period here under consideration was found to be 868,500,000 lbs.
3. The fee for the use of the landing area by revenue flights of the scheduled airlines, in terms of a rate per thousand pounds of maximum allowable gross weight for landing would therefore be \$0.1905

C. Rental for Space in Passenger Terminal Building

The determination of equitable rental rates for space in the passenger terminal building required consideration of several controlling and limiting factors. These were:

1. The amount of potentially revenue-producing space to be provided.
2. The weight to be given to the variations in cost as between the different types of space provided.
3. The average vacancy for which allowance should be made.
4. Services to be provided by the Aeronautics Board.

Each of these factors will be discussed individually.

Revenue-Producing Space Provided

The revenue-producing space provided in the Passenger Terminal Building as of January 1, 1968, the beginning of the rate making period here under consideration, is 30,421 square feet. The break-down of this space by type and location is given in Exhibit 12.

Weight to be Given Variations in Cost

The several varieties of space provided in the Terminal Building makes it necessary to apply proper weighting factors to the various types of space in order to convert the break-even need to an equitable system of rental rates. Weighting factors were assigned to the various types of space provided in the Terminal Building on the basis of construction costs. When the average amount of each type of revenue-producing space available is weighted by the factor indicative of its relative cost, the equivalent basic rental units are as follows:

<u>Types of Space</u> (1)	<u>Average Sq. Feet</u> <u>to be Available</u> (2)	<u>Weighting</u> <u>Factor</u> (3)	<u>Equivalent</u> <u>Rental Units</u> (4)
Enclosed, air conditioned finished	16,994	1.00	16,994
Enclosed, not AC-finished	4,602	0.72	3,313
Enclosed, not AC-Utility finished	6,049	0.55	3,327
Open Deck	2,776	0.10	278
Total	30,421	—	23,912

Allowance for Vacancy

During the rate-making period here under consideration, it is unlikely that there will be any significant amount of vacancy in the available revenue-producing space. Accordingly, no allowance has been made for vacancy in establishing rates per square foot.

Services to be Provided by the Board

The break-even need developed for the Terminal Building necessarily has been based on definite assumptions as to the services to be provided by the Aeronautics Board and those to be provided by its tenants. The services provided by the Aeronautics Board to the various types of airline space in the Terminal Building are shown in Exhibit 10.

Basic Passenger Terminal Building Rentals

The basic rental rates for floor space in the Passenger Terminal Building are rates which cover facilities and services which are made available to any tenant, and exclude any special installations made for a single tenant or for a group of tenants. This has been carried out with respect to the premises occupied by Fred Harvey by the separate accumulation of break-even need in Line 2-b of Exhibit 1, applicable to special installations and services provided for the use of this tenant.

In addition to the above total, which should appropriately be deducted from the Passenger Terminal Building break-even need in order to establish the basic rental units, the income which the Board can expect to receive from the rental of advertising wall space within the terminal, income which will not require the use of any floor space. We estimate that during the rate-making period here under consideration, the average annual amount of such income will be approximately \$1,200.

When consideration is given to the factors discussed above, the appropriate basic rental rates for floor space in the Passenger Terminal Building are as follows:

1. Break-even need from Exhibit 1		\$305,077
2. Deductions		
a. Prospective income from wall space not requiring floor space	\$1,200	1,200
3. Net to be recovered through space rental		303,877
4. The income producing floor space on which to base the rental schedule was found above to be equivalent, in terms of basic rental units, to		23,912
5. This gives the following average break-even need for each type of potentially revenue-producing floor space available in the Terminal Building:		

Types of Space	Average Break-Even Need per Square Foot
(1)	(2)
Enclosed, air conditioned finished	\$12.71
Enclosed, not AC-finished	9.15
Enclosed, not AC-utility finish	6.99
6. It should be noted that the above-established rates are the full rental charge, other than for ancillary services, for space made available to airlines, other aeronautical interests, and the Federal Government; but are minimums against percentage of gross business in the case of space made available to concessionaires.	

II. General Principles With Respect to Airport Rate-Making

The establishment of airport rates, fees, rentals, and other charges involves the application of reasonable general principles based on experience both in rate-making and in airport operation.

As background, it is well to keep in mind the fact that an airport is not a single business, and hence is not an entity whose rates, fees, rentals, and other charges can be treated as if they were those of a single business. An airport is a complex of several different kinds of business,—different

not only in the service provided, but fundamentally different in respect to the reasons why the services are provided, and the manner in which the services are used. The typical terminal-type airport is a complex of businesses which are neither dependent nor independent, but which are inter-dependent both in their services to air transportation, viewed broadly, and in their services to the general public.

To illustrate, consider first the landing area which, at many airports is considered to include all of the area to, from, or across which an aircraft may be moved, and of which every aeronautical user of the airport has a right to use in common with others similarly situated. Thus the landing area includes the runways, which are used for the landing and taking-off of aircraft; the related taxiways, which permit the access to and egress from the runways; and the taxiways which permit the interchange of aircraft between the runways and their related taxiways, on the one hand, and ramp areas and loading positions, on the other hand.

Of similar character but sometimes treated separately for rate-making purposes is the public ramp and apron area. This area will include the ramp and loading positions adjacent to the passenger terminal buildings, and also the ramp and loading positions adjacent to the cargo terminal buildings if one be provided.

Here are two areas, sometimes combined for rate-making purposes, which must be provided if the site is to be usable as an airport, since these are the areas which permit the landing, inbound circulation, positioning, unloading, servicing, loading, outbound circulation, and taking off of the aircraft. They are areas which the aeronautical user of the airport must use in whole or in part if he is to use the airport at all. These are areas which require a very substantial investment if they are to accommodate the full range of aircraft prospectively desiring their use, and this investment must be approximately the same whether

these facilities are used at five percent, 50 percent, or 100 percent of their capacity. These are also areas which an airport which has received a grant-in-aid under the Federal Airport Act of 1946, as amended, must operate, as a matter of contractual obligation with the Federal Government, on fair and reasonable terms and without unjust discrimination. And these are areas from which such an airport may not exclude any individual user except as a member of a class, all of which has been excluded, and the exclusion of an entire class of users must be justified from the standpoint of safe operation or other reasonable grounds. In addition, these are areas which the airport operator who has received a grant-in-aid under the Federal Airport Act of 1946, as amended, must make available continuously for public use except and to the extent that their use is prevented by flood, storm, war, civil insurrection, and other causes beyond the control of the operator.

When these aspects of the operation of the landing area and of the ramp and apron areas are considered in relation to the amount of land required for an airport for scheduled service at a large metropolitan area, it becomes clear that insofar as the landing area and ramp and apron areas on an airport be concerned, the airport operator is in the public utility business in every sense of the word.

The passenger terminal building, on the other hand, is a special-purpose building which provides, among others, the following types of space and related services:

1. Space which is an essential adjunct to the use of the landing area by scheduled air carriers. This includes, among others, ticket counter and check-in space, operations space, and baggage reclaim space. The airport operator is under no statutory or contractual obligation to provide any of these types of space, or, if provided, to make it available on any particular terms or conditions.

2. Space which is used by the Federal Aviation Administration and the United States Weather Bureau in connection with their activities at the airport. The portion of this space which is concerned, in the case of the Federal Aviation Administration, with airport traffic control, and in the case of the Weather Bureau, with airport weather observations and briefings, is required under the Federal Airport Act of 1946, as amended, to be provided without charge except for services such as air conditioning, heat, light, water, sewerage, and cleaning. The work carried out by the Federal Agencies in such space is essential to the safe and effective utilization of the landing area by all classes of users.
3. Office space for use by Government agencies, commercial air carriers, and other tenants, for activities which do not necessarily have to be carried on in the airport terminal building or even at the airport, but which are inconvenienced by a location in the terminal building.
4. Space for so-called "consumer services", the number and character of which depends on the volume of air traffic and the size and character of the community whose airport is involved. These services, which range from public restrooms to privately-operated hotel facilities, from shoe-shine stands to commercial banks, and from soft-drink machines to luxury-type food and beverage service, are provided to meet the needs of the people who may be in the terminal building at any given time, regardless of the reason. The patronage of these services comes from employees at the airport, from passengers who originate or terminate their air journey at the airport, from friends and relatives who come to the airport with outbound passengers or to meet inbound passengers,

from passengers transitting the airport, and from residents of the surrounding area who come to the airport as an entertainment or recreational center. Except for the public restrooms, there is no compelling need for the provision of space for these consumer services except as desirable services for the general public at the airport.

In the light of these facts, it is reasonable to conclude with respect to the passenger terminal building at the airport, that:

1. It is not a public utility in the sense in which the term is traditionally used.
2. Within the passenger terminal building, there are broadly two classes of space:
 - a. Space made available as an adjunct to the use of the landing area, which should reasonably be considered subject for rate-making purposes to the same policies followed in establishing the fees for the use of the landing area.
 - b. Space used for consumer services, which is made available to private operators to serve a market not otherwise available to them. For such space, the airport operator has a right to a compensatory rental as a minimum, with a participation in gross revenue above such minimum commensurate with the response of the market to the service provided.

In the light of the above discussion and related factors, it may reasonably be concluded that the basic kinds of business in which the operator of a terminal-type airport engages are as follows:

1. The operation of the landing area as a public utility.

2. The development and offering of building space in the passenger and cargo terminal buildings, the use of which is necessary or desirable as an adjunct to the use of the landing area.
3. The development of space in the passenger terminal building which is desirable for the provision of consumer services to people who may be in the passenger terminal building.
4. The development and offering of land for the installation of improvements, and, in some cases, the installation of improvements, the use of which is necessary or desirable as an adjunct to the use of the landing area.
5. The development and offering of land for the installation of improvement, and, in some cases, the actual installation of improvements, the use of which is desirable for the provision of additional consumer services to people who may come to the terminal building.

Another characteristic of the airport business which bears on rate-making, and which is often not appreciated, is the fact that the airport operator is basically a landlord, providing facilities and services to private businesses which, in turn, offer products and services to the ultimate consumers. Except for its operation of the public restrooms and observation gallery in the passenger terminal building, the airport operator typically does not deal with the ultimate consumer. This means that so far as any tenant or user of airport facilities or services be concerned, the airport operator is in the same position as any other supplier from the standpoint of having to secure a compensatory return for what it supplies if it is to continue to keep the supply of its facilities and services in balance with demand.

So far as the scheduled airlines be concerned, in this respect the positions of the airport operator is exactly the

same as that of suppliers of aviation fuel, suppliers of in-flight meals, suppliers of repair parts and accessories, suppliers of flight equipment, and even the labor force. The cost of the facilities and services provided by an airport operator is only one of the many elements of business expense which each tenant and user of an airport must combine with the other costs to which he is put in order to determine how and at what price he will offer his own products or services to the ultimate consumer. This leads to the conclusion that airport tenants and users have no more right to expect to receive facilities and services from the airport operator at less than cost than from any other supplier.

This point is emphasized because it is frequently suggested that the airport operator should accept less than compensatory fees for some of his facilities and/or services in order to help his airport tenants and users promote their businesses. But the airport operator is no more in a position to do this than are the suppliers of aviation fuel, the manufacturers of aircraft, the suppliers of in-flight meals, the suppliers of repair parts and accessories, and so on. It is the business enterprise which deals with the ultimate consumer which has the problem of promoting its business on the basis of the total costs which it must bear in order to provide the products or services which it sells. It is certainly not the problem of the intermediate supplier of facilities or services, such as an airport operator, who cannot continue to supply such facilities and services unless his return is at least compensatory in relation to the costs of providing, operating, and maintaining the facilities and services which he offers.

In addition to the variety of businesses which are carried on at the airport, and the fact that an airport operator deals with other businesses as a landlord rather than as ultimate consumers, there are several other special factors which need to be kept in mind in developing a structure and level of rates for an airport. These include:

1. The fact that there are statutory requirements which bear on rate-making at the airport, including provisions of the Federal Aviation Act of 1953, as amended, and of the Federal Airport Act of 1946, as amended.
2. The fact that there are usually contractual obligations which may to a greater or lesser degree bear on the structure and level of rates at an airport, including particularly any Grant Agreements executed under the Federal Airport Act of 1946, as amended.
3. The fact that there are many considerations of public policy which bear on the rates, fees, rentals, and other charges adopted for an airport, entirely apart from the statutory and contractual requirements. These include items such as the following:
 - a. The fact that the tenants and users of most airports have available to them the municipal services of the community or communities in the areas around the airport, yet the tenants and users of the airport normally pay no taxes on the facilities which they use at the airport.
 - b. The fact that in many communities the voters or their elected representatives have made clear that airports must proceed henceforth on a self-supporting basis through the sale of revenue bonds.

With this general background in mind, it is appropriate to consider in descriptive terms what an airport should reasonably expect to recover through its rates, fees, rentals, and other charges from the various facilities and services which it offers.

It is submitted that the airport operator will not be meeting its obligation to its own community if it provides any

facilities or services below their true economic cost; that it will not be meeting its obligation to its aeronautical tenants and users if it imposes rates, fees, rentals, and other charges in excess of their true economic cost except as additional increments may be required for reserves and debt service margin to provide needed financing; and that it will not be protecting the interests of tax-paying purveyors of merchandise and services outside the airport unless the rental rate for concessionaires and purveyors of consumer services at the airport is set at a compensatory rental as a minimum, with a participation in gross revenue above such minimum commensurate with the response of the market to the service provided.

The common factor, therefore, in the rental to be recovered from all classes of airport tenants and users is the compensatory rental required to recover the real economic cost of providing, operating, and maintaining airport facilities and services. The initial task in airport rate-making, therefore, is to determine the total amount which must be recovered from the airport to cover the real economic cost of providing, operating, and maintaining its facilities and services. For convenient reference, this is sometimes called the "Airport Break-even Need." The question then becomes, from the standpoint of policy, the factors which should be considered to arrive at the total break-even need for a given airport for a given rate-making period. Each of these will be discussed individually.

Return on Investment in Land

Land is a permanent asset of the airport operator and can be converted to other uses in the event the airport is discontinued. Consequently, no justification is seen for including in the airport break-even need an increment for recovery of this investment. On the other hand, so long as the investment in land is not recovered, there is an annual cost for the rent on this capital at least equal to the interest rate normally associated with long-term debt. It is considered, therefore, that an appropriate policy

with respect to the return on investment in land to be included in the airport's break-even need, would be to include an increment for interest on such investment at an appropriate long-term rate.

Return on Investment in Depreciable Improvements

Investment in depreciable improvements will be used up over the reasonable economic life of the facilities involved, and hence must be recovered over that life in the form of an annual depreciation charge if the airport operator is to be made whole. It should be emphasized that the period over which this investment must be recovered is the reasonable *economic* life of the facilities involved, which is not necessarily as long as their *physical* life.

It is sometimes argued that the annual charge for depreciation should not be based on original cost, but rather on the original cost less an assumed amount for residual value at the end of the depreciation period. There is little in airport experience to date, however, to justify an assumption that the typical depreciable improvement at an airport will, in fact, have residual value in excess of the cost of demolition, removal, and restoration,—and much to indicate that it will not. The original terminal buildings and some of the runways at Cleveland, Dallas, Denver, New York (La Guardia), and St. Louis are cases in point. Consequently, it is not considered reasonable to deduct an assumed residual value before determining the annual increment to include in the airport break-even need for recovery of the investment in depreciable improvements.

Another cost to be recognized as part of the return required on investment in depreciable improvements is the interest on such investment.

Another element for which allowance should be made in determining the return required on investment in depreciable improvements is the periodic maintenance re-

quired in such improvements. Such maintenance covers items which do not recur each year, and hence are not normally covered in the annual maintenance budget. Typical would be exterior painting, re-roofing, seal-coating, and the like. Normal practice is to establish a reserve for such maintenance by setting aside an annual allowance for such items out of revenue, and then to make the expenditures out of the reserve fund as such periodic maintenance is required. Such an allowance will normally run from 0.5 percent to 1.5 percent of the estimated reproduction cost, depending on the nature of the depreciable improvement.

In the light of the above discussion, it is considered that an appropriate policy with respect to the return on investment in depreciable improvements to be included in the airport's break-even need would be to include the following increments:

1. An increment for depreciation based on the reasonable economic life of an improvement, with no allowance for residual value.
2. An increment for periodic maintenance determined by applying an appropriate rate to the estimated reproduction cost of the various depreciable improvements.

Administration, Operation and Maintenance Expenses

Expenses of administration, operation and maintenance are clearly part of the break-even need of an airport. Airport tenants, particularly scheduled airlines, frequently question whether the amount spent or budgeted for the administration, operation, and maintenance of the airport is fair and reasonable.

Since most airport operators must process their expense budgets through established municipal procedures, most of which involve a public hearing, it would appear that air-

port tenants and users who question the fairness and reasonableness of airport expenses should raise their questions at such hearings and not in connection with rate-making procedures. Consequently, it is considered appropriate, as a matter of policy, that the airport expenses as budgeted or as expected to be budgeted be included in the break-even need for the airport.

Increment for Reserves and Debt Service Margin

Normally, the break-even need would not include increments for reserves and debt service margin other than the items discussed above. On the other hand, in the case of an airport operator required to finance through the sale of airport revenue bonds, it may be necessary to include such increments in the break-even need in order to provide an adequate margin to permit the sale of such bonds at a reasonable rate. This is a matter which can only be decided individually based on the facts as they apply to the situation of a given airport. Nevertheless, to the extent that such increments be required in order to permit the financing of needed improvements, they are real economic costs and should, as a matter of policy, be reflected in the break-even need.

The Matter of Federal Investment

The discussion to this point has assumed that the carrying charges on investment, whether depreciable or non-depreciable, would be based on the total investment made, regardless of the source of funds. This would mean that the break-even need would include both interest and depreciation on the portion of the airport investment represented by grants-in-aid by the Federal Government.

It has been argued, however, that these grants have been made to aid the aeronautical users of the airport, and that they should be excluded from the rate base and their carrying value excluded from the break-even need. With the informal support of the Federal Aviation Administra-

tion, most airports in the United States have excluded such grants from their rate bases. The result of this procedure has been to pass on to airport tenants and users, without permanent benefit to the airport operator, the grants-in-aid which have been made to encourage and assist airport development.

Clearly, grants-in-aid do little to provide for the "future needs of civil aeronautics" if they be treated as grants to be liquidated for the benefit of airport tenants and users rather than for the benefit of the airport. A sounder and more defensible policy would be to treat these Federal grants-in-aid as revolving funds for the permanent support of adequate airport development. To accomplish this objective, however, the investment would have to be recovered through the airport's rates, fees, rentals, and other charges.

While the exclusion of Federal grants-in-aid from the rate base is not considered sound airport rate-making policy, such exclusions have been made in this report in the light of current practice and the attitude of the Federal Aviation Administration.

Conclusions as to Break-Even Need

On the basis of the above discussion, it is concluded that the establishment of rates, fees, rentals, and other charges for a given airport requires first the establishment of the average annual break-even need for the airport during the rate-making period, such break-even need to include:

1. Interest at a fair long-term rate on the total investment.
2. Depreciation on the total investment in depreciable improvements.
3. Interest at a fair long-term rate on the declining balance of the total investment in depreciable improvements.

4. An increment for a reserve for periodic maintenance, the amount to be determined by applying an appropriate rate to the estimated reproduction cost of depreciable improvements.
5. Expenses of administration, operation, and maintenance, as budgeted or expected to be budgeted.
6. An increment, if required to permit economical financing of needed improvements, for reserves and debt service margin.

The resulting amount would be the average annual amount which should be produced over the rate-making period by the structure and level of rates adopted for the airport.

Distribution of the Break-Even Need

Once the break-even need be established for an airport, the next problem is to distribute this break-even need among the various facilities and services which must be priced. Typically this is done by establishing so-called "Cost Areas," which are functionally homogeneous activities such as the landing area, the terminal area, the hangar area, and the like.

The actual distribution of the total break-even need among the various cost areas is a matter of cost accounting, involving direct distribution to individual cost areas wherever practical, and allocations based on appropriate formulae where distribution is not feasible.

Cross-Crediting of Excess Revenues

It has been argued that when excess revenues are developed by one area of the airport, as might be the case in the terminal area as a result of percentage leases with concessionaires, such excess revenues should be credited against the break-even need of other areas, such as the landing area, before establishing the rates, fees, rentals,

or other charges applicable to such area. This argument is based on a theory advanced by the scheduled air carriers that they generate the patronage at the airport, including the patronage of the concessions, and hence are entitled to any excess revenues which may accrue from such patronage.

No sound basis is found for this argument. No aeronautical users of an airport would be treated unfairly under the rate-making procedures discussed herein, since no rates applicable to such users or tenants would exceed the airport's break-even need, and this break-even need would reflect only the true economic costs of providing, operating, and maintaining the facilities and services offered, with such increments for reserve and debt service margin, if any, as might be required to finance needed improvements. Under these circumstances, a claim by one class of tenants such as the scheduled airlines to excess revenues from concessionaire operations is, simply an attempt by that class of tenant to secure the use of public facilities and services at rates which are less than compensatory, — clearly an approach which is not consistent with public interest.

Furthermore, the claim that air traffic and related airport patronage is generated by a particular carrier or carriers is also without foundation. Air traffic is generated by the community and results from the economic character of the community and its need for transportation. The traffic will move whether the community be served by carriers A, B, or C; or by carriers X, Y, or Z.

**FEEs FOR THE USE OF
PUBLIC AIRCRAFT FACILITIES
AND
RENTAL FOR PASSENGER TERMINAL PREMISES,
FOR FREIGHT TERMINAL PREMISES,
FOR RENTABLE BUILDINGS, AND
FOR GROUND SPACE**

KENT COUNTY AIRPORT

Three Years Beginning January 1, 1968

I. Recommended Structure and Level of Rates

On the basis of the general principles with respect to airport rate-making which are discussed in Section II, and the detailed discussion of rates, fees, rentals, and other charges presented in Sections III-XI, inclusive, it is recommended that during the three years beginning January 1, 1968, the structure and level of rates at the Kent County Airport be as follows:

1. For the use of the Landing Area:

- a. By aircraft of a scheduled airline, the appropriate fee for each departure, including the preceding landing, if either be for revenue, expressed in terms of a rate per thousand pounds of maximum allowable gross weight of the aircraft for landing, is:

\$0.1661

The above charge should include the right to use aircraft loading positions on the Passenger Terminal Apron. There should be no charge for a departure by such aircraft if neither the departure, nor the preceding landing, be for revenue.

- b. By civil non-airline aircraft having a maximum allowable gross weight for landing of

7,500 pounds or more, the appropriate fee for each departure, including the preceding landing, is:

\$0.20

with a minimum for each such take-off of \$2.00.

- c. By based civil non-airline aircraft having a maximum allowable gross weight for landing of 5,000 pounds or more, but less than 7,500 pounds, a flat fee of:

\$15.00 per month, or \$150.00 per year

- d. By based civil non-airline aircraft having a maximum allowable gross weight for landing of 2,500 pounds or more, but less than 5,000 pounds, a flat fee of:

\$12.00 per month, or \$120.00 per year

- e. By based civil non-airline aircraft having a maximum allowable gross weight for landing of 2,500 pounds or less, a flat fee of:

\$9.50 per month, or \$95.00 per year

- f. Air Taxi Aircraft's share of the break-even need of the landing area was found previously to be \$10,404. To recover this amount on the basis of the aircraft weight prospectively to be operated by air taxi companies would require a rate of approximately 72 cents per thousand pounds of maximum allowable gross weight for landing. It is felt that for the current rate-making period, this rate could be approximately established at 35 cents per thousand pounds of maximum allowable gross weight for landing.

2. For space in the Passenger Terminal Building, the annual rental rates per square foot should be as follows:

Type of Space (1)	Rate per Square Foot (2)
Enclosed, air conditioned	\$14.14
Enclosed, not AC-utility finish	4.95
Enclosed, unheated utility finish	3.54
Open deck	1.41

The above rental rates are appropriate only under Agreements and Leases where the Commission's responsibility for services does not exceed that shown in Exhibit 10. These rates should be firm and not affected by the volume or the value of the business done by the tenant, where the tenant is a scheduled airline authorized to provide service to Kent County.

In the case of other tenants, the Commission should fix the rental rates at such levels, relative to the above, as may be required by the exercise of sound business judgment, including the establishment of minimum guarantees, with the actual rent determined by the minimum guarantee or by a percentage of the volume of the business done by the tenant, whichever be greater.

3. For the public automobile parking area, at the passenger terminal building a minimum annual rental of \$65,000, with the actual rental to be this minimum guarantee or the amount determined by application of the percentage of gross business bid by the successful bidder, whichever be higher.
4. With respect to the public aircraft parking and tie-down space,
 - a. Establish a rate for the use of the paved airline aircraft parking space of 20 cents per thousand pounds of maximum allowable gross weight for landing for each eight hours, or

fraction thereof, with no free use of such area permitted.

- b. For paved aircraft parking area for general aviation aircraft, establish a rate of \$20 per month for aircraft based at the airport, at a rate of \$1.75 per day for aircraft not based at the airport.
 - c. For unpaved space for the parking and tie-down of general aviation aircraft,

\$3.00 per month for aircraft based at the airport.

\$1.00 per day or fraction thereof for itinerant aircraft.
5. With respect to fixed-base operation,
 - a. It is recommended that no adjustments be made in the physical facilities made available to the existing fixed-base operator, or any extension made in the demised premises, unless the term of the agreement be reduced to 20 to 25 years, and the corresponding adjustment made in their annual rental obligations.
6. With respect to rental of buildings,
 - a. The hotel should provide an average annual guaranteed minimum rental of around \$25,500 per year.
7. Rentable land should have a basic price of \$900 per acre per year to which should be added location increments of from \$100 to \$4,100 per year depending on the location of the land in relation to the terminal building, in relation to runways and taxiways, in relation to rail and highway access, and the like.

III. Fees for the Use of the Landing Area

Typically, the Landing Area at an airport is considered to include the runways and taxiways, and the related land required to meet normal clearance requirements related thereto. At airports in the United States, it has become customary to include the Passenger Terminal Apron and, where provided, the Freight Terminal Apron as part of the Landing Area, in order to avoid the necessity for establishing and collecting separate fees for each of these two apron areas. The Kent County Airport will have little in the way of a Freight Terminal Apron during the rate-making period here under consideration. Accordingly, the break-even need for the Landing Area, as shown in Exhibit 1, is the sum of the break-even need for the Runways and Taxiways, for the Passenger Terminal Apron, and for the Freight Terminal Apron. This break-even need is as follows:

Annual Break-Even Need of the Landing Area

Landing Area Sub-Areas (1)	Annual Break-Even Need (2)
Runways and Taxiways	\$234,330
Passenger Terminal Apron	50,949
Total	\$285,279

The costs applicable to each of these sub-areas of the landing area have been accumulated separately because of the portion of their break-even need which should be allocated to each class of use will vary as between them. Each will be discussed individually.

Passenger Terminal Apron Sub-Area

The loading positions at the Passenger Terminal Building have been designed primarily on the basis of the requirements of scheduled air carriers. Provision has been made, however, for the use of one of eight loading positions on the Passenger Terminal Apron by air taxis. Con-

sequently, 88 percent of the break-even need of the Passenger Terminal Apron has been assigned to the scheduled air carrier, and the balance to air taxis.

Public Runways and Taxiways

Typically, the runways, and taxiways will be used by scheduled air carriers, by general aviation, and by such military aircraft as may land at the airport. The distribution of the break-even need of the runways and taxiways as between these types of users can be based on one or a combination of the following factors:

1. The number of aircraft departures in relation to total aircraft departures.
2. The maximum allowable gross weight at take-off of aircraft departing the airport in relation to the maximum allowable gross weight at take-off of all aircraft departing the airport.

The use of aircraft departures alone to allocate runway and taxiway costs bases such an allocation solely on the airspace capacity, and hence runway capacity utilized.

The use of maximum allowable gross weight at take-off of aircraft lifted from the airport to allocate runway and taxiway costs gives recognition to the added costs involved in the provision of airport facilities adequate to handle large airline aircraft. It fails, however, to recognize the fact that airline operations typically are with heavy aircraft, and hence use up less airspace and runway capacity in relation to weight lifted than do non-airline civil aircraft operations.

It is considered necessary, therefore, to allocate runway and taxiway break-even need on the basis of a formula which gives equal weight both to aircraft departures and to the maximum allowable gross weight at take-off of aircraft lifted from the airport. To achieve such an allocation, forecasts have been made of prospective average

annual departures by each type of airport user during the rate-making period here under consideration, as well as of the prospective average maximum allowable gross weight at take-off of the aircraft in prospective use by each type of user. The results, from the standpoint of percentage distribution of runway and taxiway break-even need, are as follows:

Distribution of Break-Even Need for Runways and Taxiways

Type of Operation (1)	Average Annual Departures Weight		Percent of Total			
	Number (2)	Average (lbs.) (3)	Total (M lbs.) (4)	Departures (5)	Weight (6)	Combined (7)
1. Scheduled Airlines	15,500	72,000	1,116,000	21.85	80.89	51.37
2. Other Air Carrier	600	61,000	36,000	0.85	2.65	1.75
3. Air Taxis	1,700	8,500	14,450	2.40	1.05	1.73
4. General Aviation	53,150	4,000	212,600	74.90	15.41	45.15
5. Total	70,950	—	1,379,630	100.00	100.00	100.00

The Landing Area As A Whole

On the basis of the above discussions, it is possible to establish the total annual amount to be recovered from the various airport users and their respective fair shares of the break-even need of the Landing Area. To make this computation complete, it is necessary to add as an additional element in the break-even need of the runways and taxiways, the rental value of the space in the Terminal Building required to be made available to the Weather Bureau without charge, except for utilities, for their use in connection with the operation of the runways and taxiways. No deduction will be made for the annual service fee which the Weather Bureau will probably pay on such space because no provision has been made in the O & M budget for the cost of such services. The resulting total break-even need for the Landing Area, and its distribution among users of the Landing Area, is as follows:

Distribution Among Landing Area Users of Landing Area Break-Even Need

Item	Total Amount	Distribution Among Landing Area Users			
		Scheduled Airlines	Other Air Carrier	Air Taxis	General Aviation
(1)	(2)	(3)	(4)	(5)	(6)
1. Break-Even need of the Passenger Terminal Apron	\$ 50,949	\$ 44,835	\$ —	\$ 6,114	\$ —
2. Break-Even need of the Runways and Taxiways	234,330	120,375	4,101	4,054	105,800
3. Rental value of space in the Terminal Building required to be given to the Weather Bureau at less than compensatory rate except for utilities	13,620	6,997	238	236	6,149
4. Total	\$298,899	\$172,207	\$4,339	\$10,404	\$111,949

Recovery From the Scheduled Airlines of Their Share of Landing Area Break-Even Need

The scheduled airlines usually argue that their portion of the break-even need of the landing area should be recovered on the basis of maximum allowable *landing* weight. There are far more persuasive arguments for the use of maximum allowable gross weight at take-off than there are for the use of maximum allowable gross weight for landing, as the unit on which to base a fee for the use of the landing area. Nevertheless, it is common practice at civil airports within the conterminous United States to use landing weight, and this unit will be used in this report.

The scheduled airlines will usually argue that fees for the use of the landing area should be applied only to revenue flights, rather than to all flights, including both revenue and non-revenue. Actually, so long as the rate be developed properly, the total amount collected by the airport will be the same whether it be distributed over revenue flights alone, or over all flights. Consequently, the rate developed in this report assumed that it will be applied only to revenue flights.

Typically, rates established for the use of the landing area in earlier years included a quantity discount, so that the rate would go down as the individual airline had more flight activity at the airport. In recent years, however, there has been a general tendency to eliminate any quantity discounts in the rates applicable to the use of the landing area. This is because no sound basis can be found for granting a discount for multiple use of the landing area by a single carrier, as distinguished from its individual use by many carriers. There might be a theoretical savings in billing, yet it can also be argued that billing is more economical without the so-called quantity discount.

While it has been argued that the quantity discount would generate additional service by the benefiting airlines, the

fact remains that the fee which the airline pays for the use of the landing area is so small in relation to its line-haul revenue and line-haul expense that even if the use of the landing area were free, it is extremely doubtful that it would have the slightest effect on the amount of service provided. Consequently, it is felt that in the interest of equitable treatment of all airlines, no quantity discount should be included in the fees applicable to the use of the landing area. This practice has been followed in this report.

On the basis of the above discussion, the fee which should be applicable to the use of the Landing Area by the scheduled airlines during the three years beginning January 1, 1968 is as follows:

- | | |
|---|--------------------|
| 1. The scheduled airlines' share of the break-even need of the Landing Area was found previously to be | 172,207 |
| 2. The prospective maximum allowable gross weight at take-off of average annual revenue departures by airline aircraft in the rate-making period here under consideration was found to be | 1,116,000,000 lbs. |
| 3. The equivalent maximum allowable gross weight for <i>landing</i> would be approximately | 1,036,950,000 lbs. |
| 4. The fee for the use of the landing area by revenue flights of the scheduled airlines, in terms of a rate per thousand pounds of maximum allowable gross weight for <i>landing</i> would therefore be | 0.1661 |

Recovery of General Aviation's Share of the Break-Even Need of the Landing Area

General Aviation's share of the break-even need of the landing area was found previously to be \$111,949. Currently, the Board has two sources through which to recover General Aviation's share of the break-even need of the landing area. They are:

1. Landing fees on the larger General Aviation.
2. Flowage fees on aviation fuel.

Obviously, careful consideration must be given to this problem if the Board is to realize from general aviation its fair share of the cost of providing, operating, and maintaining the landing area. To close the indicated gap, it is recommended that:

1. The current fuel flowage fees be increased by approximately 12%.
2. All general aviation aircraft with a maximum allowable gross weight for landing of 7,500 pounds or more be required to pay a landing fee at a rate of \$0.20 per thousand pounds of maximum allowable gross weight for landing, with a minimum of \$2.00 per landing.
3. Aircraft based at the airport with a maximum allowable gross weight for landing of less than 7,500 pounds be required to pay a flat fee for unlimited use of the landing area which would be \$9.50 per month, or \$95.00 per year, for aircraft with a maximum allowable gross weight for landing of less than 2,500 pounds; \$12.00 per month, or \$120.00 per year, for aircraft with a maximum allowable gross weight for landing of 2,500 pounds or more, but less than 5,000 pounds; and \$15.00 per month, or \$150.00 per year, for aircraft with a maximum allowable gross weight for landing of 5,000 pounds or more, but less than 7,500 pounds.

Recovery of Air Taxi Aircraft's Share of the Break-Even Need of the Landing Area

Air Taxi Aircraft's share of the break-even need of the landing area was found previously to be \$10,404. To recover this amount on the basis of the aircraft weight prospectively to be operated by air taxi companies would require a rate of approximately 72 cents per thousand pounds of maximum allowable gross weight for landing. It is felt that for the current rate-making period, this rate could appropriately be established at 35 cents per

thousand pounds of maximum allowable gross weight for landing.

IV. Rental for Space in Passenger Terminal Building

The determination of equitable rental rates for space in the passenger terminal building required consideration of several controlling and limiting factors. These were:

1. The amount of potentially revenue-producing space to be provided.
2. The weight to be given to the variations in cost as between the different types of space provided.
3. The average vacancy for which allowance should be made.
4. Services to be provided by the Aeronautics Board.

Each of these factors will be discussed individually.

Potentially Revenue-Producing Space to be Provided

The potentially revenue-producing space to be provided in the Passenger Terminal Building as of January 1, 1968, the beginning of the rate making period here under consideration, is 29,694 square feet. The break-down of this space by type and location is given in Exhibit 12.

Weight to be Given Variations in Cost

The several varieties of space to be provided in the Terminal Building makes it necessary to apply proper weighting factors to the various types of space in order to convert the break-even need to an equitable system of rental rates. Weighting factors were assigned to the various types of space to be provided in the Terminal Building on the basis of construction costs. When the average amount of each type of revenue-producing space to be available is weighted by the factor indicative of its relative cost, the equivalent basic rental units are found to be as follows:

Type of Space (1)	Average Square Feet To Be Available (2)	Weighting Factor (3)	Equivalent Rental Units (4)
Enclosed, air conditioned	18,466	1.00	18,466
Enclosed, not AC-utility finish	6,358	0.35	2,225
Enclosed, unheated-Utility finish	2,094	0.25	524
Open Deck	2,776	0.10	278
Total	29,694	—	21,493

Allowance for Vacancy

During the rate-making period here under consideration, it is unlikely that there will be any significant amount of vacancy in the available revenue-producing space. Accordingly no allowance has been made for vacancy in establishing rates per square foot.

Services to be Provided by Commission

The break-even need developed for the Terminal Building necessarily has been based on definite assumptions as to the services to be provided by the Aeronautics Board and those to be provided by its tenants. Unless the agreements and leases executed with tenants reflect these assumptions, it will not be appropriate to utilize the rental rates here developed. The services assumed to be provided by the Aeronautics Board in the various types of airline space in the Terminal Building are shown in Exhibit 10. In space to be rented to concessionaires and in commercial office space, it has been assumed that the Aeronautics Board would provide heat, electricity for illumination, and air conditioning, with all other services to be provided by the tenant.

Basic Passenger Terminal Building Rentals

The basic rental rates for floor space in the Passenger Terminal Building should be rates which cover facilities and services which will be made available to any tenant, and should exclude any special installations made for a single tenant or for a group of tenants. This has been carried out with respect to the premises occupied by Fred Harvey by the separate accumulation of break-even need in Line 2-b of Exhibit 1, applicable to special installations and services provided for the use of this tenant.

In addition to the above total, which should appropriately be deducted from the Passenger Terminal Building break-even need in order to establish the basic rental rates, the Board can expect to receive from the rental of advertising

wall space within the terminal, income which will not require the use of any floor space. We estimate that during the rate-making period here under consideration, the average annual amount of such income should be approximately \$1,200.

When consideration is given to the factors discussed above, the appropriate basic rental rates for floor space in the Passenger Terminal Building are found to be as follows:

1. Break-even need from Exhibit 1	\$305,077
2. <i>Deductions</i>	
a. Prospective income from wall space not requiring floor space	\$1,200 1,200
3. Net to be recovered through space rental	303,877
4. The income-producing floor space on which to base the rental schedule was found above to be equivalent, in terms of basic rental units, to	21,493
5. This gives the following average break-even need for each type of potentially revenue-producing floor space available in the Terminal Building:	

Type of Space (1)	Average Break-Even Need per Square Foot (2)
Enclosed, air conditioned	\$14.14
Enclosed, not AC-utility finish	4.95
Enclosed, unheated-utility finish	3.54
Enclosed, unheated-utility finish	1.41

6. It should be noted that the above-established rates are intended to be the full rental charge, other than for ancillary services, for space made available to airlines, other aeronautical interests, and the Federal Government; but to be simply minimums against percentages of gross business in the case of space made available to concessionaires.

Recovery of Break-Even Need for Harvey Premises

It will be noted from Exhibit 1, that a separate annual break-even need of \$22,169 is shown for the premises occupied by Fred Harvey in the Passenger Terminal Building. This has nothing to do with the basic rental for the space to be utilized by Harvey, the minimum for which should be at the above rates. In addition, however, the minimum paid by Harvey should cover this separate break-even need which represents the annual break-even need on the special installations and equipment provided for Harvey, which are normally the responsibility of the tenant. The appropriate minimum annual rental for the space to be occupied by Harvey in the Passenger Terminal Building should, therefore, be as follows:

1. <i>Basic Rental</i>	
7,413 square feet of enclosed air conditioned space at	\$14.14 \$104,820
1,422 square feet of enclosed space not air conditioned—utility finish at	4.95 7,039 \$111,859
2. <i>Rental on Installations and Equipment</i>	22,169
3. Total	\$134,028

V. Rental for Public Automobile Parking Spaces

During the rate-making period here under consideration, the Aeronautics Board will provide enlarged public automobile parking space in front of the Passenger Terminal Building.

In the past, the Board, itself, has operated the public automobile parking space opposite the Passenger Terminal Building. In the 9 months ended September 30, 1968, this operation was reported as returning revenue of \$79,485. It will be noted from Exhibit 1, that during the rate-making period here under consideration, the break-even need for this area will be \$64,542. Clearly reconsideration must be given to the question of whether

this facility should continue to be operated by the Board, or whether it should be awarded to a private contractor on competitive bidding.

On the basis of past experience at the airport, the average annual income potentially available during the three years beginning January 1, 1968 should be about \$93,000, of which the Board should net about \$65,000. On the basis of past experience, it appears to us that the chances of realizing net dollars in this amount from Board operation are sufficiently doubtful to justify soliciting bids from private operators.

In such event, the break-even need set forth in Exhibit 1 should be established as the minimum, with private operators bidding on identical invitations to bid, bidding the single percentage which they will pay on gross revenue for each of the three years beginning January 1, 1968.

VII. *Public Aircraft Parking and Tie-Down Space*

During the rate-making period here under consideration, the Aeronautics Board will be providing paved parking area for airline aircraft, paved parking area for general aviation aircraft, and unpaved area for aircraft parking and tie-down. It is assumed that each of these areas will be operated directly by the Board. The rates considered appropriate for each will be discussed individually.

Rates for Paved Aircraft Parking Area for Airline Aircraft

It will be noted from Exhibit 1 that the break-even need for the paved airline aircraft parking area will total \$2,173 annually. Two parking spaces are provided so that the break-even need for each space will be \$1,087.

At a sixty-six and two-thirds percent load factor, which appears reasonable, this would require the recovery from each space of \$4.50 per day.

It is recommended, therefore, that use of the paved airline aircraft parking space be at a rate of 20 cents per

thousand pounds of maximum allowable gross weight for landing for each eight hours, or fraction thereof, with no free use of such space permitted.

Rates for Paved Aircraft Parking Area for General Aviation Aircraft

It will be noted from Exhibit 1 that the break-even need for the paved area for the parking of general aviation aircraft is \$10,659. Sixty such spaces are to be provided or an average annual break-even need per aircraft space of \$178.

Basically there should be two classes of users,—the operator who bases at the airport, who would like to rent such space on a monthly basis; and the aircraft operator coming in as an itinerant who will wish to use it intra-day or overnight. To allow for partial vacancy among both types of users, it is recommended that the rates be set as follows:

\$20 per month for aircraft based at the airport

\$1.75 per day for aircraft not based at the airport

Rates for the Use of Unpaved Parking and Tie-Down Area by General Aviation Aircraft

It will be noted from Exhibit 1 that the break-even need for the aircraft parking and tie-down area is \$1,361. It will accommodate 150 aircraft for an annual cost of \$8.50 per aircraft, or about \$0.75 per aircraft per month.

Here, again, users will include aircraft based at the airport, and itinerant aircraft. To allow for partial use of each type of such aircraft, it is recommended that the rates be as follows:

\$3.00 per month for aircraft based at Kent County Airport

\$1.00 per day, or fraction thereof, for itinerant aircraft

VII. *Fixed Base Operators*

Currently there is one fixed-base operator at the Airport,—Northern Air Service. It will be noted from Exhibit 1 that during the rate-making period here under consideration, the break-even need on the installation which has been financed for this operator will be \$68,396. The agreements currently in effect with this operator provide for average annual payments of about \$62,601,—an annual deficit of about \$5,795.

Basically, this facility would show a much greater prospective annual deficit if the term of the lease were not so long. It is recommended, therefore, that no adjustments be made in the physical facilities made available to Northern Air Service, or an extension made in their demised premises, unless the term of the agreement be reduced to 20 to 25 years, and a corresponding adjustment made in annual rental obligation.

VIII. *Rentable Buildings*

Apart from the building for Northern Air Service, the Board has only one building which it has installed and rented to an individual tenant,—this is the hotel building.

It will be noted from Exhibit 1 that during the rate-making period here under consideration, the break-even need on the hotel building, will total approximately \$23,300 annually. Under the agreements currently in effect, the revenue from this facility can be expected to be \$24,000 to \$26,000 annually.

IX. *Other Rentable Land*

It will be noted from Exhibit 1 that the break-even need on Other Rentable Land is expected to total \$33,110 annually. There is a total of approximately 287 acres of such land, so that the average annual break-even need would be \$115 per acre per year.

Such land is widely distributed throughout the airport, however, and it is obvious that what would be a fair price for a particular acre, would be a grossly unfair price for another acre. It is recommended, therefore, that the pricing be approximately as follows:

A basic price of \$900 per acre per year, regardless of location.

A location increment of from \$100 to \$4,100 per acre per year depending on the location of the land in relation to the terminal building, in relation to runways and taxiways, in relation to rail and highway access, and the like.

[Exhibits omitted in printing]

PLAINTIFF'S EXHIBIT 24

[LOGO]

PIEDMONT AIRLINES
 KENT COUNTY INTERNATIONAL AIRPORT
 5500 South 44th Street
 Grand Rapids, MI 49508

October 16, 1985

Mr. Robert Ross
 Director of Aeronautics
 Kent County Airport
 Grand Rapids, MI 49508

Dear Mr. Ross:

During a recent Manager's meeting a question arose about the fire protection for our overnight equipment. After the meeting was adjourned I spoke to Mr. Hidley to confirm the coverage of the Fire Department. I don't know why I didn't realize the Fire Department was not here between midnight and 0600. There have been times that our flights arrive after midnight but just as important is the equipment that is here all night. There is NO WAY we could save an airplane should a fire start during the night. During the colder winter months we keep agents here all night just to keep the airplane warm. This is done by the APU or a heat truck. We have been very lucky we've not had an APU or heat truck fire.

We, as the Grand Rapids Airline Managers Council, would like to request a review of this shortcoming in our airport coverage. An airport this size, with as many as 10 large aircraft overnighing, needs fire protection 24 hours per day.

We would, also, again like to ask for the painting of SAFETY LINES under and around the loading bridges.

We are asking for trouble with all the men and equipment working around this area.

Awaiting your reply.

Sincerely,

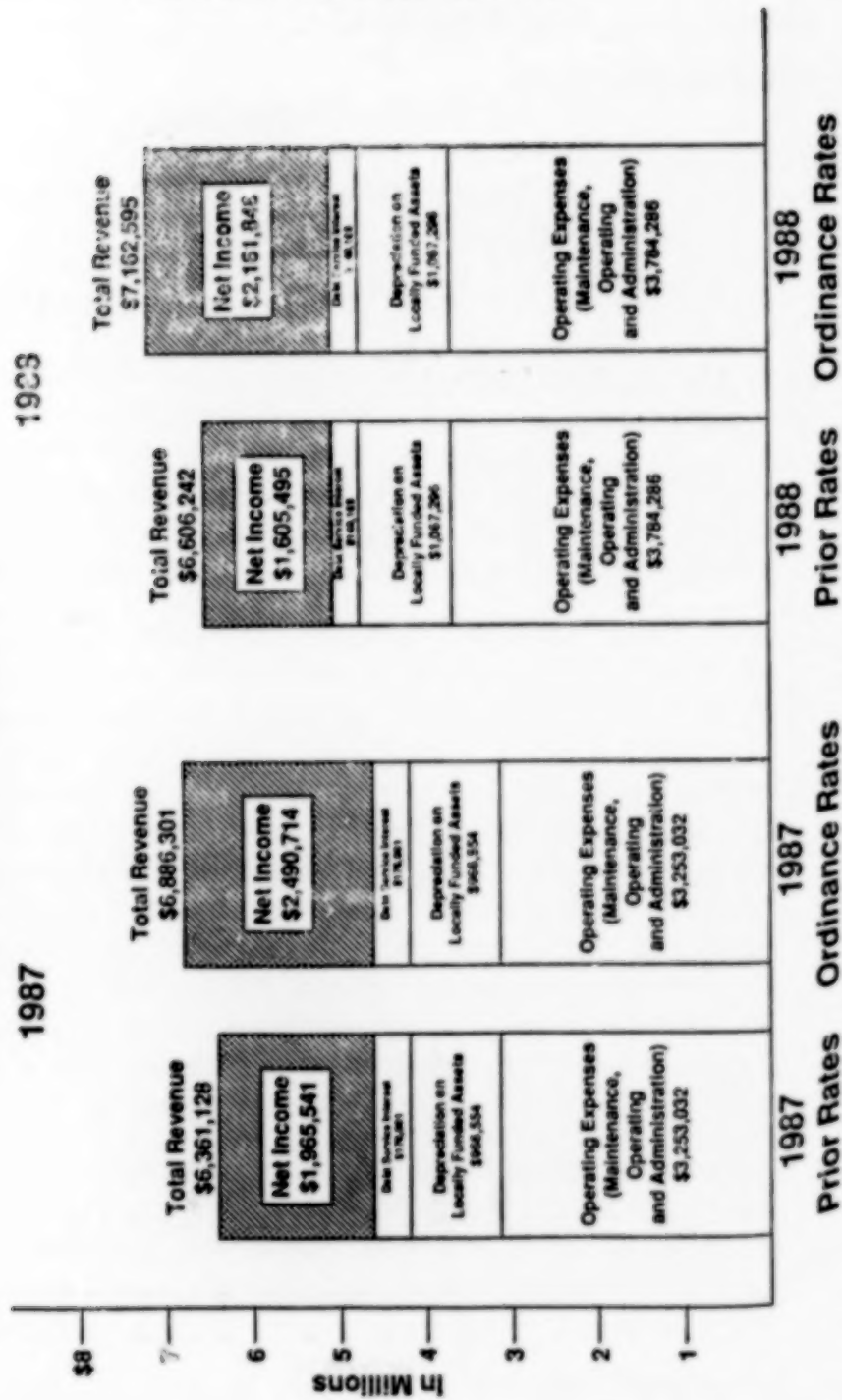
/s/ Jim Haney
 JIM HANEY
 President, GRAMC

cc: Mr. Andrew DeKraker
 All Managers

GRAND RAPIDS AIRPORT NET INCOME ANALYSIS

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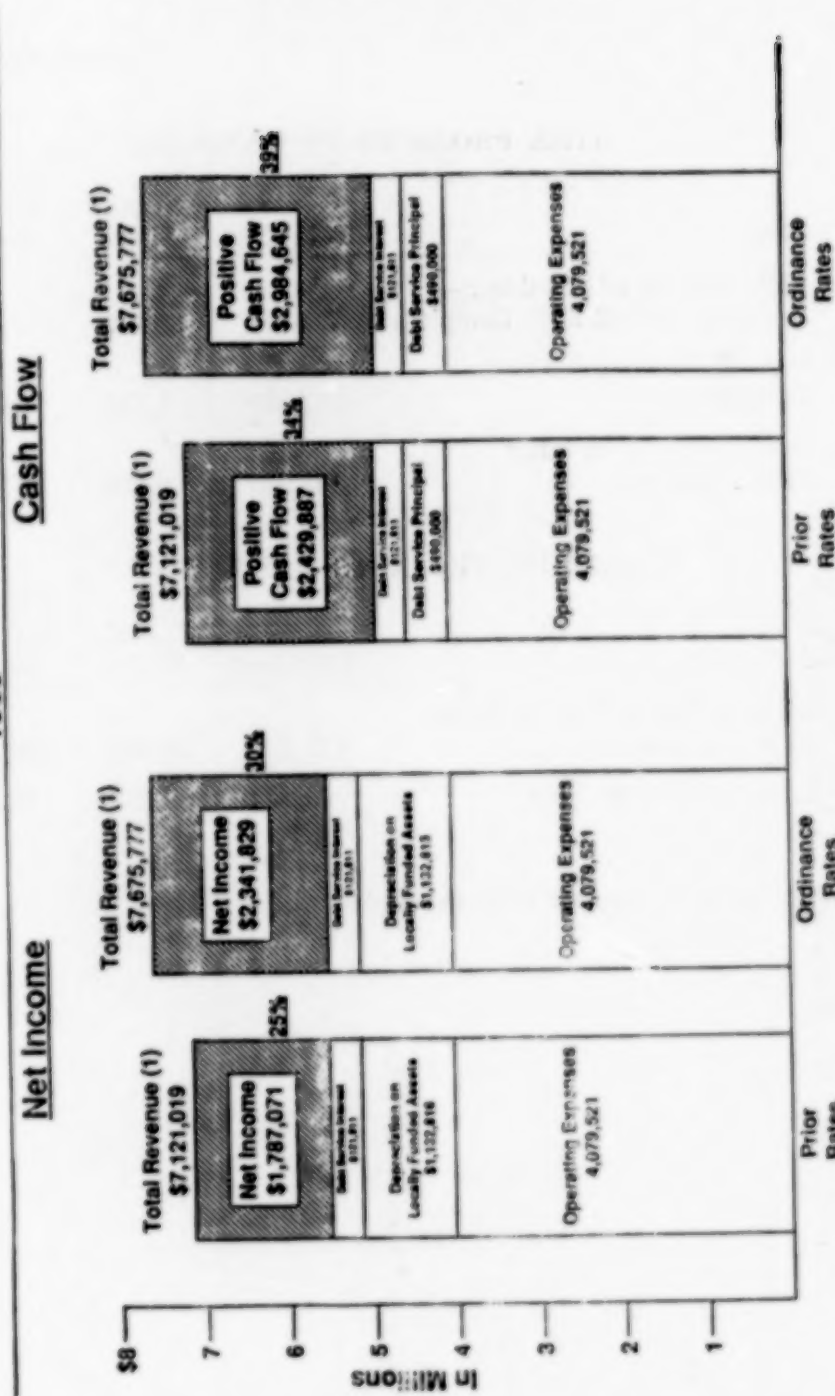
PLAINTIFF'S EXHIBIT 301



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PLAINTIFF'S EXHIBIT 355

GRAND RAPIDS AIRPORT NET INCOME and CASH FLOW ANALYSIS



US Includes Estimated Interest Revenue on Restricted Assets of \$377,000

DEFENDANT'S EXHIBIT DA-23

January 31, 1990

CAPITAL PROJECTS IN PROGRESS

Project	Total Cost	*Local Share	Federal & State Share
1. C79—Paving of Shoulders—Runway 26L/8R 80% Complete	712,982	35,649	677,333
2. C80—Electric Gates 20% Complete	17,369	1,335	16,034
3. C85—Security Fencing 20% Complete	181,950	9,098	172,852

PLANNING PROJECTS UNDERWAY

Project	Total Cost	*Local Share	Federal & State Share
1. Airport Master Plan & Noise 24% Complete	313,570	15,678	297,892
2. Heliport Master Plan	99,449	4,972	94,477

* Local share on deposit with the state

January 31, 1990

ANTICIPATED CAPITAL PROJECTS
1990 TO 2000

Project	Total Est. Cost (based on 1990 dollars)	*Local Share	**Federal Share
1.A) Rehabilitate Terminal Apron (Concourse A)	\$ 1,200,000	COUNTY \$60,000 STATE \$60,000	\$ 1,080,000
2.A) FAA-GADO, Rapid Air Aprons & Taxiway "G" Extension	\$ 390,000	COUNTY \$31,900 STATE \$7,100	\$ 351,000
3.A) Taxiway Guidance Signs	\$ 60,000	COUNTY \$3,000 STATE \$3,000	\$ 54,000
4.B) Apron Expansion Concourse B (east end)	\$ 650,000	\$ 65,000	\$ 585,000
5.B) Grading & Drainage Along Rwy 8L/26R	\$1,335,000	\$ 133,500	\$ 1,201,500
6.C) Pave, Light & Groove Rwy 8L/26R (7000') and Connecting Taxiways (New Master Study now underway, May substitute extension to 18/36—costs comparable)	\$17,000,000	\$ 1,700,000	\$15,300,000

Project	Total Est. Cost (based on 1990 dollars)	*Local Share	**Federal Share
7.D) Apron Expansion Concourse B (north side)	\$ 1,700,000	\$ 170,000	\$ 1,530,000
8. Centerline & Touchdown Lights Rwy 8R/26L	\$ 2,000,000	\$ 200,000	\$ 1,800,000
9. Airport Access Control System—Required Under FAR 107 (Must be in place by 1992)	\$ 900,000	90,000	810,000
10. Wildlife Management Program—Required under FAR 139 (FAA Requested we develop plan under current Master Plan Study to minimize deer and bird hazards to aircraft)	\$ 250,000	\$ 25,000	\$ 225,000
11.E) Land Acquisitions (Esraugh 8A ± and Basset Property 20 A + and Weber Property (1A ±))	\$	NOT KNOWN	
Future Land Acquisition Program to be Developed	\$	NOT KNOWN	
12. New G.A. Ramp @ Rapid Air.	\$ 250,000	\$ 25,000	\$ 225,000
Aero Med—Roads— Connecting Taxiway	\$ 100,000	\$ 100,000	
	\$ 175,000	\$ 17,500	\$ 157,500
13. Airfield Maintenance Equip. (Mowers, end loaders utility vehicles & snow plows not subject to federal funding.)	\$ 900,000	\$ 900,000	

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14. Snow Plows & Blower (FAA Eligible)	\$ 700,000	\$ 70,000	\$ 630,000
15. Hold Rooms North Side concourse B (to serve Item #1 & 4)	\$ 1,500,000	\$ 750,000	\$ 750,000
16. Expand ticket wing to east (100' x 135)	\$ 1,700,000	\$ 850,000	\$ 850,000
17. Auto Parking Surface (1,000 cars)	\$ 600,000	\$ 600,000	
18.C) Parking Garage—700 car	\$ 4,900,000	\$ 4,900,000	
19. Parking Lot Shuttle Buses (3)	\$ 75,000	\$ 75,000	
20. Replace ARFF Vehicles one-2,500 gallon and one-500 gallon (required under FAR 139)	\$ 510,000	\$ 51,000	\$ 459,000
21.F) Federal Express Freight Building	\$ 740,000	\$ 740,000	
22.F) Emery Freight Building Addition	\$ 600,000	\$ 600,000	
23.F) Aero Med Hangar	\$ 750,000	\$ 750,000	
24. Motel Expansion (Approved by Aeronautics Board) (Implementation Questionable)	\$ 1,000,000	\$ 1,000,000	
25.F) FAA—FSDO Building	\$ 700,000	\$ 700,000	
26. Computer Systems	\$ 300,000	\$ 300,000	
27. Secondary Water Service to Airport (3,600')	\$ 180,000	\$ 180,000	

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Project	Total Est. Cost (based on 1990 dollars)	*Local Share	**Federal Share
28. Alternate Main Power Feed to Airport (3,600')	\$ 120,000	\$ 120,000	
29. Alternate Freight Area (to be determined in new Master Plan)	\$ 2,160,000	\$ 216,000	\$ 1,944,000
TOTAL ***	\$43,445,000	\$15,493,000	\$27,952,000

* Estimated Cost to Implement Would Include Any State Participation for Federal Projects

** Eligible for Federal Aid Under Current AIP Program (ends October 1992). The amount of participation from the FAA will be limited to the amount of Federal monies available at time of request.

*** Not including land acquisition costs from item 11 above

- A) Under Federal Grant, plans being developed for 1990 construction season.
- B) Federal Grant applied for
- C) This improvement contained in 1983 Master Plan approved by the FAA.
- D) Submitted to MAC in our 5 year development, dated March 20, 1989.
- E) Negotiations for purchase underway.
- F) Lease negotiations underway for construction

ASSOCIATED CITY GRAND RAPIDS	STATE MI	IPIAS NO. 26-0039	SITE NO. 09852. A
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COUNTY CODE 081 KENT	SPSA 3000	AIRPORT KENT COUNTY INTERNATIONAL CODE 08R HUB B REGION 0L FED AGREE	REVISION DATE 02/07/90	OWNER PUB	CORRECTION U
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PLANS COMPLETED ALP - 84 MASTER - U METRO - REGION - STATE - 89	AIRPORT RELIEVED - AIRPORT REPLACED - AIRPORT SUPPLANT - CROSS REFERENCE - NEW AIRPORT - SPECIAL LOCATION -	SITE NO.	CURRENT CAPACITY ANNUAL OPS 320,000 HOURLY OPS VFR - 149 IFR - 57
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AIRPORT ROLE - LEVEL OF SERVICE

SVC LVL	AIRPORTS WITH SCHEDULED SERVICE STAGE LENGTH TYPE	AIR TARI ENP 1100	SPECIAL FUNDING PROJ	RUNWAY LENGTH	FED INT	DESIGN TYPE	BASED ACFT	INSTR	ANNUAL OPS 11000	
									111N	TOT
C	PR B	TP	724	45		TR	159	1	135	143
1-5	PR S	TP	894	59	MAIL	TR	160	1	130	176
6-10	PR S	TP	1036	71	MAIL	TR	167	11	138	184

DEVELOPMENT INCLUDES 1-5 YR. 8-10 YR. NEW RUNWAYS BL-26R	RUNWAY EXTENSIONS 18-26
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Approved by *Alan C. Nitz*
Detroit Airports District Office
Federal Aviation Administration
Date 02/17/90

ELIGIBLE AIRPORT DEVELOPMENT COSTS (x \$1000)

LAND-D	LAND-N	PAVING LIGHTING	APPROACH AIDS	TERMINAL	OTHER	TOTAL
1-5 YR. 2000	2000	11060	200	300	4050	19590
6-10 YR. 2000	1000	11170	200	1000	5300	20670

BASE YR SALABILITY	RETIRE- STRUCTURE	STANDARDS	ENVIRON- MENT	UPGRADE	CAPACITY	NEW COMMUNITY CAPACITY
1-5 YR. 720 1800	2010 4000	11550 32000	2000 1000		1500 10670	
6-10 YR.						

I, *Alan C. Nitz*, hereby certify that I am the Supervisor of the Michigan Section of the Detroit Airports District Office of the Great Lakes Region, Federal Aviation Administration, and that this document is an official record filed in this Public Office, that the content is correct, and that I am the custodian of this document and am authorized to have this certification.

Alan C. Nitz
ALAN C. NITZ

ELIGIBLE DEVELOPMENT COSTS FOR KENT COUNTY INTERNATIONAL

PLAN	DATE	FLIGHTING ITEMS	AMOUNT	FISCAL YEAR	COM- PLETED	USEA	DESCRIPTION
1-5 YR	02/07/90	CA	70	89	Y	Y	CONST GA AFON
	02/06/90	CA	140	89	Y	Y	EXPAND GA AFON
	02/06/90	CA	1000	89	Y	Y	REHAB. AFON
	02/07/90	SA	70	89	Y	Y	SECURITY FENCE
	02/06/90	ST	1000	89	Y	Y	TX & RW GUIDANCE SIGNS
	02/06/90	ST	135	89	Y	Y	CONST. COM. TX & TX S
	02/07/90	CA	700	90	N	N	EXPAND TERMINAL AFON
	02/07/89	RE	500	90	N	N	REPLACE FENCE
	02/07/89	SA	400	90	N	N	SECURITY CARD SYSTEM
	02/07/89	SA	80	90	N	N	SECURITY FENCE
	02/07/89	ST	1000	90	N	N	LAND DEVELOPMENT
	02/07/89	ST	1400	90	N	N	DRAINAGE IMPROVEMENTS
	02/07/89	ST	300	90	N	N	CONST. COM. TX
	02/06/90	CA	300	91	N	N	EXPAND GA AFON
	02/07/89	EN	200	91	N	N	CONST. TX STR
	02/06/90	RE	1000	91	N	N	LAND NOISE
	02/06/90	ST	1000	91	N	N	LAND DEVELOPMENT
	02/07/89	ST	150	91	N	N	ELECT VOLT EQUIP
	02/07/89	ST	1000	92	N	N	LAND NOISE
	02/07/89	ST	3000	92	N	N	UTILITY RELOCATION
	02/07/89	ST	1000	92	N	N	RD RELOCATION
	02/07/89	ST	3000	92	N	N	OBST REMOVAL
	02/07/89	ST	150	93	N	N	SECURITY FENCE
	02/07/89	ST	1000	93	N	N	FW 18/26 REELS
	02/07/89	ST	1000	93	N	N	FW 18/26 VADI
	02/07/89	ST	1000	93	N	N	EXT MITL RW 18/26 TX
	02/07/89	ST	1000	93	N	N	EXT MITL RW 18/26 TX
	02/07/89	ST	150	93	N	N	ELECT VOLT EQUIP
	02/07/89	ST	4000	93	N	N	CONST. RW 18/26 (8000-150)
	02/07/89	ST	1500	93	N	N	CONST. TX 18/26 (8000-75)
	02/07/89	ST	2000	94	N	N	REPLACE MITL RW BR/26L
	02/07/89	ST	1000	94	N	N	REPLACE WINDCONE
	02/07/89	ST	1000	94	N	N	REHAB MITL 6 SIGNS
	02/07/89	ST	1000	94	N	N	REHAB MITL RW 18/26 TX
	02/07/89	ST	1000	94	N	N	REHAB RW BR/26L
	02/07/89	ST	500	94	N	N	REHAB TX
	02/07/89	ST	1000	94	N	N	SPE
	02/07/89	ST	19590	94	N	N	
		TOTAL:					
6-10 YR	02/06/89	CA	100		N	N	AGL-DET RW BL/26R REELS
	02/06/89	CA	100		N	N	EXPAND AFON
	02/06/89	CA	1000		N	N	LAND DEVELOPMENT 1150 AC)
	02/06/89	CA	170		N	N	INSTALL MITL RW BR/26L
	02/06/89	CA	200		N	N	INSTALL MITL F&R TX
	02/06/89	CA	300		N	N	OBSTN. REMOVAL
	02/06/89	CA	200		N	N	UTILITY RELOCATION
	02/06/89	CA	200		N	N	SERVICE RD
	02/06/89	CA	4000		N	N	CONST. RW BL/26R (6850 x 150)
	02/06/89	CA	200		N	N	CONST. TX STR

DEFENDANT'S EXHIBIT DA-35B

ASSURANCES

Airport Sponsors

A. General

1. These assurances shall be complied with in the performance of grant agreements for airport development, airport planning, and noise compatibility program grants to airport sponsors.
2. These assurances are required to be submitted as part of the project application by sponsors requesting funds under the provisions of the Airport and Airway Improvement Act of 1982, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987, or the Aviation Safety and Noise Abatement Act of 1979. As used herein, the term "public agency sponsor" means a public agency with control of a public-use airport; the term "private sponsor" means a private owner of a public-use airport; and the term "sponsor" includes public agency sponsors and private sponsors.
3. Upon acceptance of the grant offer by the sponsor, these assurances are incorporated in and become part of the grant agreement.

B. Duration and Applicability

1. **Airport Development or Noise Compatibility Program Projects Undertaken by a Public Agency Sponsor.** The terms, conditions and assurances of the grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired for an airport development or noise compatibility program project, or throughout the useful life of the project items installed within a facility under a noise compatibility program project, but in any event not to exceed twenty (20) years from the date of acceptance of a grant offer of Federal funds for the project. However, there shall be no

PLAN	DATE	FL. AMOUNTS. CAT.	ENGINEERS. FEE	AMOUNT	FISCAL YEAR	COPY FILED	USER ID	OFFICE	DESCRIPTION
8-10 VR	02/08/89	CA	TR	1500		N	100	ADA DE I	CONST. FOR TX BL/204 (6050 X 75)
	02/08/89	CA	TR	500		N	100	ADA DE I	
	02/08/89	EN	LN	10000		N	100	ADA DE I	LAND NOISE (150 AC)
	02/08/89	FE	AP	2000		N	100	ADA DE I	REPAIR ASPHALT
	02/08/89	KE	LI	2000		N	100	ADA DE I	REPAIR PTL & STONS
	02/08/89	LE	OT	5000		N	100	ADA DE I	REPLACE S&E
	02/08/89	KE	TE	10000		N	100	ADA DE I	REPAIR REPAIR
	02/08/89	SA	TR	5000		N	100	ADA DE I	REPAIR LA
	02/08/89	SA	OT	10000		N	100	ADA DE I	QUALITY CHECK
	02/08/89	SA	OT	2000		N	100	ADA DE I	ADDT BUILD EXPANSION
	02/08/89	SI	LI	3000		N	100	ADA DE I	ADDT EQUIP.
	02/07/90	SI	LI	3000		N	100	ADA DE I	14 GUINNESS STONS
	02/08/89	SI	LI	3000		N	100	ADA DE I	T02 & CL LIGHTS RM BR/204
	02/08/89	SI	OT	5000		N	100	ADA DE I	ELEC VARY EQUIP
	02/08/89	SI	OT	10000		N	100	ADA DE I	REPAIR IMPROVEMENTS
	02/08/89	SI	OT	10000		N	100	ADA DE I	S&E BUILD EXPANSION
	02/08/89	SI	OT	20000		N	100	ADA DE I	REPAIR REPAIR
			TOTAL:						
			GRAND TOTAL:	40200					

I, Dawn C. Mitz, hereby certify that I am the Supervisor of the Michigan Section of the Detroit Airports District Office of the Great Lakes Region, Federal Aviation Administration, and that this document is an official record filed in this public office, that the document is correct, and that I am the custodian of this document and am authorized to make this certification.

Dean C. Nitz

limit on the duration of the assurance against exclusive rights or the terms, conditions, and assurances with respect to real property acquired with Federal funds. Furthermore, the duration of the Civil Rights assurance shall be as specified in the assurance.

2. Airport Development or Noise Compatibility Program Projects Undertaken by a Private Sponsor. The preceding paragraph 1 also applies to a private sponsor except that the useful life of project items installed within a facility or the useful life of facilities developed or equipment acquired under an airport development or noise compatibility program project shall be no less than 10 years from the date of the acceptance of Federal aid for the project.

3. Airport Planning Undertaken by a Sponsor. Unless otherwise specified in the grant agreement, only Assurances 1, 2, 3, 5, 6, 13, 18, 30, 32, 33, and 34 in Section C apply to planning projects. The terms, conditions, and assurances of the grant agreement shall remain in full force and effect during the life of the project.

C. Sponsor Certification. The sponsor hereby assures and certifies, with respect to this grant that:

1. General Federal Requirements. It will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines and requirements as they relate to the application, acceptance and use of Federal funds for this project including but not limited to the following:

Federal Legislation

- a. Federal Aviation Act of 1958—49 U.S.C. 1301, et seq.
- b. Davis-Bacon Act—40 U.S.C. 276(a), et seq.¹
- c. Federal Fair Labor Standards Act—29 U.S.C. 201, et seq.
- d. Hatch Act—5 U.S.C. 1501, et seq.²

- e. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970—42 U.S.C. 4601, et seq.^{1 2}
- f. National Historic Preservation Act of 1966—Section 106—16 U.S.C. 470(f).¹
- g. Archeological and Historic Preservation Act of 1974—16 U.S.C. 469 through 469c.¹
- h. Flood Disaster Protection Act of 1973—Section 102(a)—42 U.S.C. 4012a.¹
- i. Rehabilitation Act of 1973—29 U.S.C. 794.
- j. Civil Rights Act of 1964—Title VI—42 U.S.C. 2000d through d-4.
- k. Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. 2101, et seq.
- l. Age Discrimination Act of 1975—42 U.S.C. 6101, et seq.
- m. Architectural Barriers Act of 1968—42 U.S.C. 4151, et seq.¹
- n. Airport and Airway Improvement Act of 1982, as amended 49 U.S.C. 2201, et seq.
- o. Powerplant and Industrial Fuel Use Act of 1978—Section 403—2 U.S.C. 8373.¹
- p. Contract Work Hours and Safety Standards Act—40 U.S.C. 327, et seq.¹
- q. Copeland Antikickback Act—18 U.S.C. 874.¹
- r. National Environmental Policy Act of 1969—42 U.S.C. 4321, et seq.¹
- s. Endangered Species Act—16 U.S.C. 668(a), et seq.¹
- t. Single Audit Act of 1984—31 U.S.C. 7501, et seq.²

- u. Drug-Free Workplace Act of 1988—41 U.S.C. 702 through 706.

Executive Orders

Executive Order 12372—Intergovernmental Review of Federal Programs

Executive Order 11246—Equal Employment Opportunity¹

Federal Regulations

- a. 49 CFR Part 18—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.³
- b. 49 CFR Part 21—Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act of 1964.
- c. 49 CFR Part 23—Participation by Minority Business Enterprise in Department of Transportation Programs.
- d. 49 CFR Part 24—Uniform Relocation Assistance and Real Property Acquisition Regulation for Federal and Federally Assisted Programs.^{1 2}
- e. 49 CFR Part 27—Non-Discrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.¹
- f. 49 CFR Part 29—Debarments, Suspensions, and Voluntary Exclusions.
- g. 49 CFR Part 30—Denial of Public Works Contracts to Suppliers of Goods and Services of Countries That Deny Procurement Market Access to U.S. Contractors.

- h. 29 CFR Part 1—Procedures for Predetermination of Wage Rates.¹
- i. 29 CFR Part 3—Contractors or Subcontractors on Public Buildings or Public Works Financed in Whole or Part by Loans or Grants from U.S.¹
- j. 29 CFR Part 5—Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction.¹
- k. 41 CFR Part 60—Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Federal and Federally-assisted Contracting Requirements).¹
- l. 14 CFR Part 150—Airport Noise Compatibility Planning.

Office of Management and Budget Circulars

- a. A-87—Cost Principles Applicable to Grants and Contracts with State and Local Governments.³
- b. A-128—Audits of State and Local Governments.²

¹ These laws do not apply to airport planning sponsors.

² These laws do not apply to private sponsors.

³ 49 CFR Part 18 and OMB Circular A-87 contain requirements for State and local governments receiving Federal assistance. Any requirement levied upon State and local governments by this regulation and circular shall also be applicable to private sponsors receiving Federal assistance under the Airport and Airway Improvement Act of 1982, as amended.

Specific assurances required to be included in grant agreements by any of the above laws, regulations or circulars are incorporated by reference in the grant agreement.

2. Responsibility and Authority of the Sponsor.

a. Public Agency Sponsor: It has legal authority to apply for the grant, and to finance and carry out the proposed project; that a resolution, motion or similar action has been duly adopted or passed as an official act of the

applicant's governing body authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.

b. Private Sponsor: It has legal authority to apply for the grant and to finance and carry out the proposed project and comply with all terms, conditions, and assurances of this grant agreement. It shall designate an official representative and shall in writing direct and authorize that person to file this application, including all understandings and assurances contained therein; to act in connection with the application; and to provide such additional information as may be required.

3. Sponsor Fund Availability. It has sufficient funds available for that portion of the project costs which are not to be paid by the United States. It has sufficient funds available to assure operation and maintenance of items funded under the grant agreement which it will own or control.

4. Good Title.

a. It holds good title, satisfactory to the Secretary, to the landing area of the airport or site thereof, or will give assurance satisfactory to the Secretary that good title will be acquired.

b. For noise compatibility program projects to be carried out on the property of the sponsor, it holds good title satisfactory to the Secretary to that portion of the property upon which Federal funds will be expended or will give assurance to the Secretary that good title will be obtained.

5. Preserving Rights and Powers.

a. It will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions,

and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims or right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.

b. It will not sell, lease, encumber or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which Federal funds have been expended, for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary. If the transferee is found by the Secretary to be eligible under the Airport and Airway Improvement Act of 1982 to assume the obligations of the grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor shall insert in the contract or document transferring or disposing of the sponsor's interest, and make binding upon the transferee, all of the terms, conditions and assurances contained in this grant agreement.

c. For all noise compatibility program projects which are to be carried out by another unit of local government or are on property owned by a unit of local government other than the sponsor, it will enter into an agreement with that government. Except as otherwise specified by the Secretary, that agreement shall obligate that government to the same terms, conditions, and assurances that would be applicable to it if it applied directly to the FAA for a grant to undertake the noise compatibility program project. That agreement and changes thereto must be satisfactory to the Secretary. It will take steps to enforce this agreement against the local government if there is substantial non-compliance with the terms of the agreement.

d. For noise compatibility program projects to be carried out on privately owned property, it will enter into an agreement with the owner of that property which includes provisions specified by the Secretary. It will take steps to enforce this agreement against the property owner whenever there is substantial non-compliance with the terms of the agreement.

e. If the sponsor is a private sponsor, it will take steps satisfactory to the Secretary to ensure that the airport will continue to function as a public-use airport in accordance with these assurances for the duration of these assurances.

f. If an arrangement is made for management and operation of the airport by any agency or person other than the sponsor or an employee of the sponsor, the sponsor will reserve sufficient rights and authority to insure that the airport will be operated and maintained in accordance with the Airport and Airway Improvement Act of 1982, the regulations and the terms, conditions and assurances in the grant agreement and shall insure that such arrangement also requires compliance therewith.

6. Consistency with Local Plans. The project is reasonably consistent with plans (existing at the time of submission of this application) of public agencies that are authorized by the State in which the project is located to plan for the development of the area surrounding the airport. For noise compatibility program projects, other than land acquisition, to be carried out on property not owned by the airport and over which property another public agency has land use control or authority, the sponsor shall obtain from each such agency a written declaration that such agency supports that project and the project is reasonably consistent with the agency's plans regarding the property.

7. Consideration of Local Interest. It has given fair consideration to the interest of communities in or near which the project may be located.

8. Consultation with Users. In making a decision to undertake any airport development project under the Airport and Airway Improvement Act of 1982, it has undertaken reasonable consultations with affected parties using the airport at which project is proposed.

9. Public Hearings. In projects involving the location of an airport, an airport runway, or a major runway extension, it has afforded the opportunity for public hearings for the purpose of considering the economic, social, and environmental effects of the airport or runway location and its consistency with goals and objectives of such planning as has been carried out by the community. It shall, when requested by the Secretary, submit a copy of the transcript of such hearings to the Secretary.

10. Air and Water Quality Standards. In projects involving airport location, a major runway extension, or runway location it will provide for the Governor of the state in which the project is located to certify in writing to the Secretary that the project will be located, designed, constructed, and operated so as to comply with applicable air and water quality standards. In any case where such standards have not been approved and where applicable air and water quality standards have been promulgated by the Administrator of the Environmental Protection Agency, certification shall be obtained from such Administrator. Notice of certification or refusal to certify shall be provided within sixty days after the project application has been received by the Secretary.

11. Local Approval. In projects involving the construction or extension of any runway at any general aviation airport located astride a line separating two counties within a single state, it has received approval for the project from the governing body of all villages incorporated under the laws of that state which are located entirely within five miles of the nearest boundary of the airport.

12. **Terminal Development Prerequisites.** For projects which include terminal development at a public airport, it has, on the date of submittal of the project grant application, all the safety equipment required for certification of such airport under section 612 of the Federal Aviation Act of 1958 and all the security equipment required by rule or regulation, and has provided for access to the passenger enplaning and deplaning area of such airport to passengers enplaning or deplaning from aircraft other than air carrier aircraft.

13. **Accounting System, Audit, and Recordkeeping Requirements.**

a. It shall keep all project accounts and records which fully disclose the amount and disposition by the recipient of the proceeds of the grant, the total cost of the project in connection with which the grant is given or used, and the amount and nature of that portion of the cost of the project supplied by other sources, and such other financial records pertinent to the project. The accounts and records shall be kept in accordance with an accounting system that will facilitate an effective audit in accordance with the Single Audit Act of 1984.

b. It shall make available to the Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, for the purpose of audit and examination, any books, documents, papers, and records of the recipient that are pertinent to the grant. The Secretary may require that an appropriate audit be conducted by a recipient. In any case in which an independent audit is made of the accounts of a sponsor relating to the disposition of the proceeds of a grant or relating to the project in connection with which the grant was given or used, it shall file a certified copy of such audit with the Comptroller General of the United States not later than 6 months following the close of the fiscal year for which the audit was made.

14. **Minimum Wage Rates.** It shall include, in all contracts in excess of \$2,000 for work on any projects funded under the grant agreement which involve labor, provisions establishing minimum rates of wages, to be predetermined by the Secretary of Labor, in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a—276a-5), which contractors shall pay to skilled and unskilled labor, and such minimum rates shall be stated in the invitation for bids and shall be included in proposals or bids for the work.

15. **Veteran's Preference.** It shall include, in all contracts for work on any projects funded under the grant agreement which involve labor, such provisions as are necessary to insure that, in the employment of labor (except in executive, administrative, and supervisory positions), preference shall be given to veterans of the Vietnam era and disabled veterans as defined in Section 515 (c)(1) and (2) of the Airport and Airway Improvement Act of 1982. However, this preference shall apply only where the individuals are available and qualified to perform the work to which the employment relates.

16. **Conformity to Plans and Specifications.** It will execute the project subject to plans, specifications, and schedules approved by the Secretary. Such plans, specifications, and schedules shall be submitted to the Secretary prior to commencement of site preparation, construction, or other performance under this grant agreement, and, upon approval by the Secretary, shall be incorporated into this grant agreement. Any modifications to the approved plans, specifications, and schedules shall also be subject to approval by the Secretary and incorporation into the grant agreement.

17. **Construction Inspection and Approval.** It will provide and maintain competent technical supervision at the construction site throughout the project to assure that the work conforms with the plans, specifications, and

schedules approved by the Secretary for the project. It shall subject the construction work on any project contained in an approved project application to inspection and approval by the Secretary and such work shall be in accordance with regulations and procedures prescribed by the Secretary. Such regulations and procedures shall require such cost and progress reporting by the sponsor or sponsors of such project as the Secretary shall deem necessary.

18. Planning Projects. In carrying out planning projects:

a. It will execute the project in accordance with the approved program narrative contained in the project application or with modifications similarly approved.

b. It will furnish the Secretary with such periodic reports as required pertaining to the planning project and planning work activities.

c. It will include in all published material prepared in connection with the planning project a notice that the material was prepared under a grant provided by the United States.

d. It will make such material available for examination by the public, and agrees that no material prepared with funds under this project shall be subject to copyright in the United States or any other country.

e. It will give the Secretary unrestricted authority to publish, disclose, distribute, and otherwise use any of the material prepared in connection with this grant.

f. It will grant the Secretary the right to disapprove the Sponsor's employment of specific consultants and their subcontractors to do all or any part of this project as well as the right to disapprove the proposed scope and cost of professional services.

g. It will grant the Secretary the right to disapprove the use of the sponsor's employees to do all or any part of the project.

h. It understands and agrees that the Secretary's approval of this project grant or the Secretary's approval of any planning material developed as part of this grant does not constitute or imply any assurance or commitment on the part of the Secretary to approve any pending or future application for a Federal airport grant.

19. Operation and Maintenance.

a. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for nonaeronautical purposes must first be approved by the Secretary. The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes.

In furtherance of this assurance, the sponsor will have in effect at all times arrangements for—

(1) Operating the airport's aeronautical facilities whenever required;

(2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and

(3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.

Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring

the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

b. It will suitable operate and maintain noise compatibility program items that it owns or controls upon which Federal funds have been expended.

20. Hazard Removal and Mitigation. It will take appropriate action to assure that such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.

21. Compatible Land Use. It will take appropriate action, including the adoption of zoning laws, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft. In addition, if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction, that will reduce the compatibility, with respect to the airport, of the noise compatibility program measures upon which Federal funds have been expended.

22. Economic Nondiscrimination.

a. It will make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination, to all types, kinds, and classes of aeronautical uses.

b. In any agreement, contract, lease or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct

or engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to—

(1) furnish said services on a fair, equal, and not unjustly discriminatory basis to all users thereof, and

(2) charge fair, reasonable, and not unjustly discriminatory prices for each unit or service, provided, that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

c. Each fixed-based operator at any airport owned by the sponsor shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities.

d. Each air carrier using such airport shall have the right to serve itself or to use any fixed-based operator that is authorized or permitted by the airport to serve any air carrier at such airport.

e. Each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classifications such as tenants or nontenants and signatory carriers and nonsignatory carriers. Classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classifications or status.

f. It will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance, repair, and fueling) that it may choose to perform.

g. In the event the sponsor itself exercises any of the rights and privileges referred to in this assurance, the services involved will be provided on the same conditions as would apply to the furnishing of such services by contractors or concessionaires of the sponsor under these provisions.

h. The sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.

i. The sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

23. Exclusive Rights. It will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of services at an airport by a single fixed-based operator shall not be construed as an exclusive right if both of the following apply:

a. It would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and

b. If allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport.

It further agrees that it will not, either directly or indirectly, grant or permit any person, firm or corporation

the exclusive right at the airport, or at any other airport now owned or controlled by it, to conduct any aeronautical activities, including, but not limited to charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982.

24. Fee and Rental Structure. It will maintain a fee and rental structure consistent with Assurance 22 and 23, for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. No part of the Federal share of an airport development, airport planning or noise compatibility project for which a grant is made under the Airport and Airway Improvement Act of 1982, the Federal Airport Act or the Airport and Airway Development Act of 1970 shall be included in the rate base in establishing fees, rates, and charges for users of that airport.

25. Airport Revenue. If the airport is under the control of a public agency, all revenues generated by the airport and any local taxes on aviation fuel established after December 30, 1987, will be expended by it for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property; or for noise mitigation purposes

on or off the airport. Provided, however, that if covenants or assurances in debt obligations issued before September 3, 1982, by the owner or operator of the airport, or provisions enacted before September 3, 1982, in governing statutes controlling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all revenues generated by the airport (and, in the case of a public airport, local taxes on aviation fuel) shall not apply.

26. Reports and Inspections. It will submit to the Secretary such annual or special financial and operations reports as the Secretary may reasonably request. For airport development projects, it will also make the airport and all airport records and documents affecting the airport, including deeds, leases, operation and use agreements, regulations and other instruments, available for inspection by any duly authorized agent of the Secretary upon reasonable request. For noise compatibility program projects, it will also make records and documents relating to the project and continued compliance with the terms, conditions, and assurances of the grant agreement including deeds, leases, agreements, regulations, and other instruments, available for inspection by any duly authorized agent of the Secretary upon reasonable request.

27. Use of Government Aircraft. It will make available all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, charge may be made for a reasonable share, proportional to such use, for the cost of operating and maintaining the facilities used. Unless otherwise determined by the Secretary, or otherwise agreed to by the

sponsor and the using agency, substantial use of an airport by Government aircraft will be considered to exist when operations of such aircraft are in excess of those which, in the opinion of the Secretary, would unduly interfere with use of the landing areas by other authorized aircraft, or during any calendar month that—

a. Five (5) or more Government aircraft are regularly based at the airport or on land adjacent thereto; or

b. The total number of movements (counting each landing as a movement) of Government aircraft is 300 or more, or the gross accumulative weight of Government aircraft using the airport (the total movements of Government aircraft multiplied by gross weights of such aircraft) is in excess of five million pounds.

28. Land for Federal Facilities. It will furnish without cost to the Federal Government for use in connection with any air traffic control or air navigation activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction, operation, and maintenance at Federal expense of space or facilities for such purposes. Such areas or any portion thereof will be made available as provided herein within four months after receipt of a written request from the Secretary.

29. Airport Layout Plan.

a. It will keep up to date at all times an airport layout plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions

of existing airport facilities; and (3) the location of all existing and proposed nonaviation areas and of all existing improvements thereon. Such airport layout plan and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the airport layout plan. The sponsor will not make or permit any changes or alterations in the airport or in any of its facilities which are not in conformity with the airport layout plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility, or efficiency of the airport.

b. If a change or alteration in the airport or its facilities is made which the Secretary determines adversely affects the safety, utility, or efficiency of any federally owned, leased, or funded property on or off the airport and which is not in conformity with the airport layout plan as approved by the Secretary, the owner or operator will, if requested by the Secretary (1) eliminate such adverse effect in a manner approved by the Secretary; or (2) bear all costs of relocating such property (or replacement thereof) to a site acceptable to the Secretary and all costs of restoring such property (or replacement thereof) to the level of safety, utility, efficiency, and cost of operation existing before the unapproved change in the airport or its facilities.

30. Civil Rights. It will comply with such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from funds received from this grant. This assurance obligates the sponsor for the period during which Federal financial assistance is extended to the program, except where Federal financial assistance is to provide, or is in the form of personal property or real property or interest therein or structures

or improvements thereon, in which case the assurance obligates the sponsor or any transferee for the longer of the following periods: (a) the period during which the property is used for a purpose for which Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits or (b) the period during which the sponsor retains ownership or possession of the property.

31. Disposal of Land.

a. For land purchased under a grant before, on, or after December 30, 1987, for airport noise compatibility purposes, it will dispose of the land, when the land is no longer needed for such purposes, at fair market value at the earliest practicable time. That portion of the proceeds of such disposition which is proportionate to the United States share of acquisition of such land will, at the discretion of the Secretary, 1) be paid to the Secretary for deposit in the Trust Fund or 2) be reinvested in an approved noise compatibility project as prescribed by the Secretary.

b. For land purchased for airport purposes (other than noise compatibility) under a grant before, on, or after December 30, 1987, it will, when the land is no longer needed for airport purposes, dispose of such land at fair market value. That portion of the proceeds of such disposition, which is proportionate to the United States share of the cost of acquisition of such land will be paid to the Secretary for deposit in the Trust Fund.

c. Disposition of such land under a. and b. above will be subject to the retention or reservation on any interest or right therein necessary to ensure that such land will only be used for purposes which are compatible with noise levels associated with the operation of the airport.

32. Engineering and Design Services. It will award each contract, or sub-contract for program management, construction management, planning studies, feasibility studies,

architectural services, preliminary engineering, design, engineering, surveying, mapping, or related services with respect to the project in the same manner as a contract for architectural and engineering services is negotiated under title IX of the Federal Property and Administrative Services Act of 1949 or an equivalent qualifications-based requirement prescribed for or by the sponsor of the airport.

33. **Foreign Market Restrictions.** It will not allow funds provided under this grant to be used to fund any project which uses any product or service of a foreign country during the period in which such foreign country is listed by the United States Trade Representative as denying fair and equitable market opportunities for products and suppliers of the United States in procurement and construction.

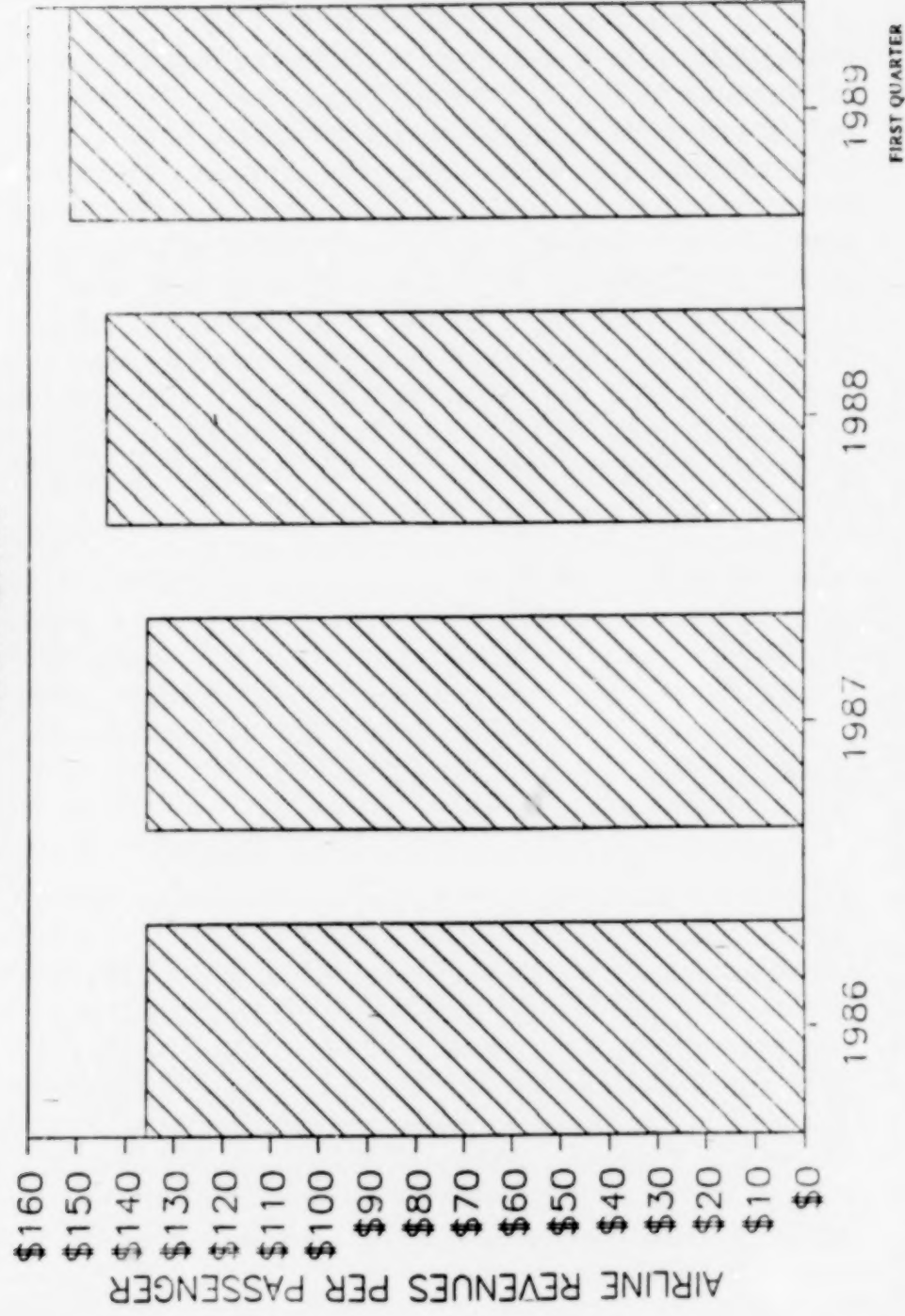
34. **Policies, Standards, and Specifications.** It will carry out the project in accordance with policies, standards, and specifications approved by the Secretary including but not limited to the advisory circulars listed in the "Current FAA Advisory Circulars for AIP Projects," dated _____ and included in this grant, and in accordance with applicable state policies, standards, and specifications approved by the Secretary.

35. **Relocation and Real Property Acquisition.** (1) It will be guided in acquiring real property, to the greatest extent practicable under State law, by the land acquisition policies in Subpart B of 49 CFR Part 24 and will pay or reimburse property owners for necessary expenses as specified in Subpart B. (2) It will provide a relocation assistance program offering the services described in Subpart C and fair and reasonable relocation payments and assistance to displaced persons as required in Subparts D and E of 49 CFR Part 24. (3) It will make available within a reasonable period of time prior to displacement comparable replacement dwellings to displaced persons in accordance with Subpart E of 49 CFR Part 24.

36. **Drug-Free Workplace.** It will provide a drug-free workplace at the site of work specified in the grant application in accordance with 49 CFR Part 29 by (1) publishing a statement notifying its employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the sponsor's workplace and specifying the actions that will be taken against its employees for violation of such prohibition; (2) establishing a drug-free awareness program to inform its employees about the dangers of drug abuse in the workplace and any available drug counseling, rehabilitation, and employees assistance programs; (3) notifying the FAA within ten days after receiving notice of an employee criminal drug statute conviction for a violation occurring in the workplace; and (4) making a good faith effort to maintain a drug-free workplace.

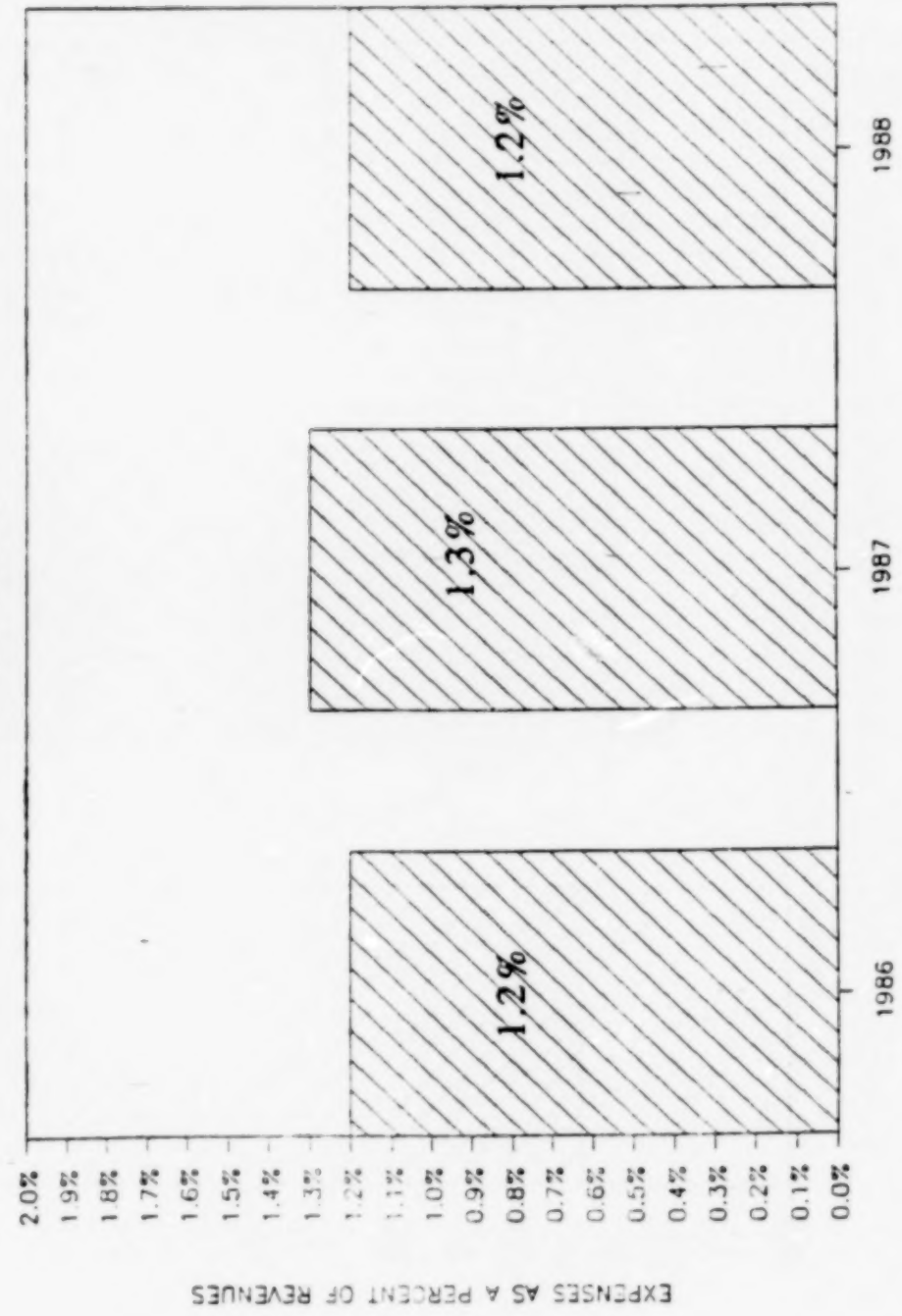
DEFENDANT'S EXHIBIT DA-36

AIRLINE REVENUES PER PASSENGER
GRAND RAPIDS

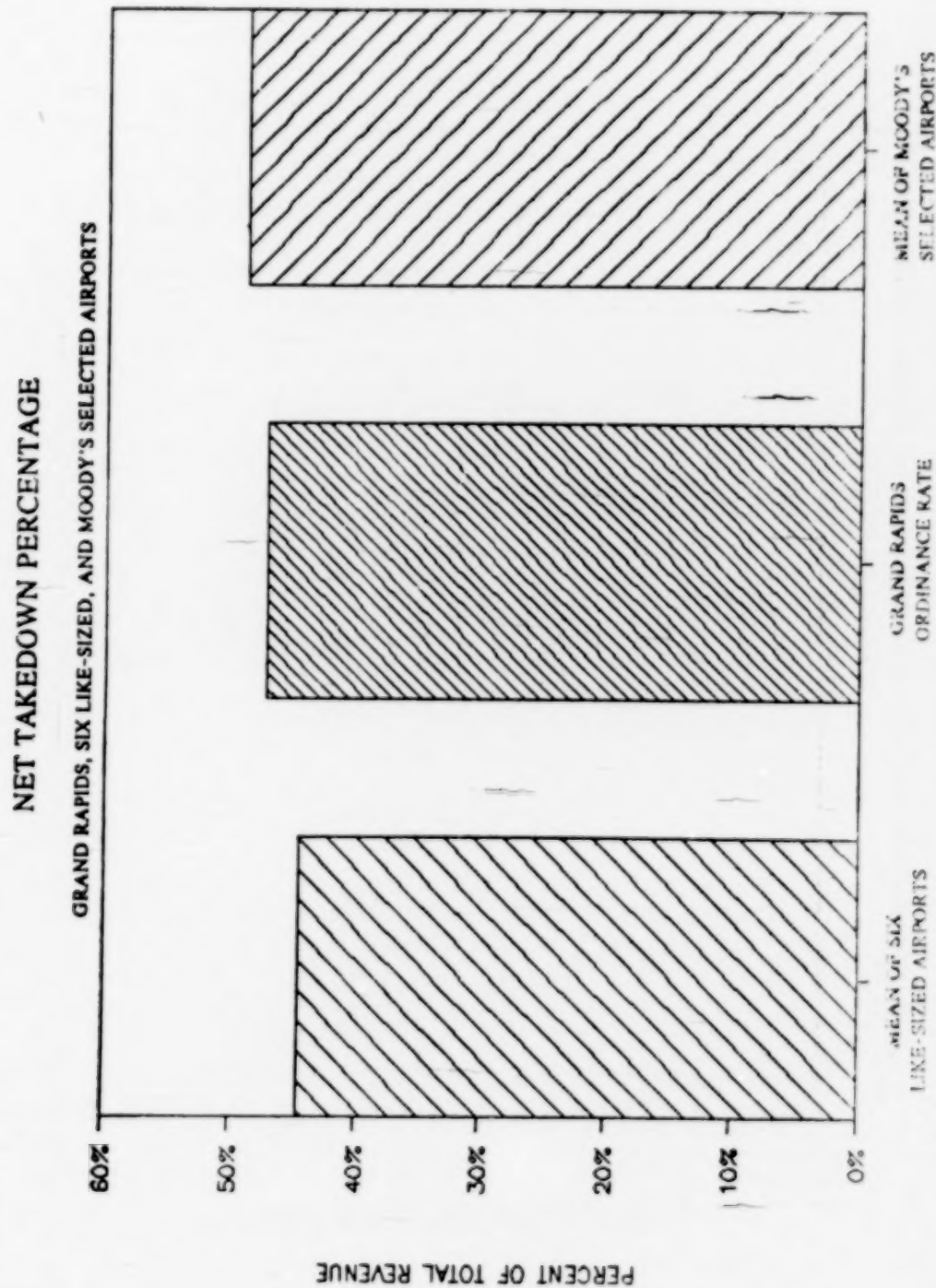


DEFENDANT'S EXHIBIT DA-37

AIRLINE/AIRPORT EXPENSES AS PERCENT OF PASSENGER REVENUES
GRAND RAPIDS



DEFENDANT'S EXHIBIT DA-42



NET REVENUES AS % OF TOTAL REVENUES
GRAND RAPIDS AND SIX LIKE-SIZED AIRPORTS
1988

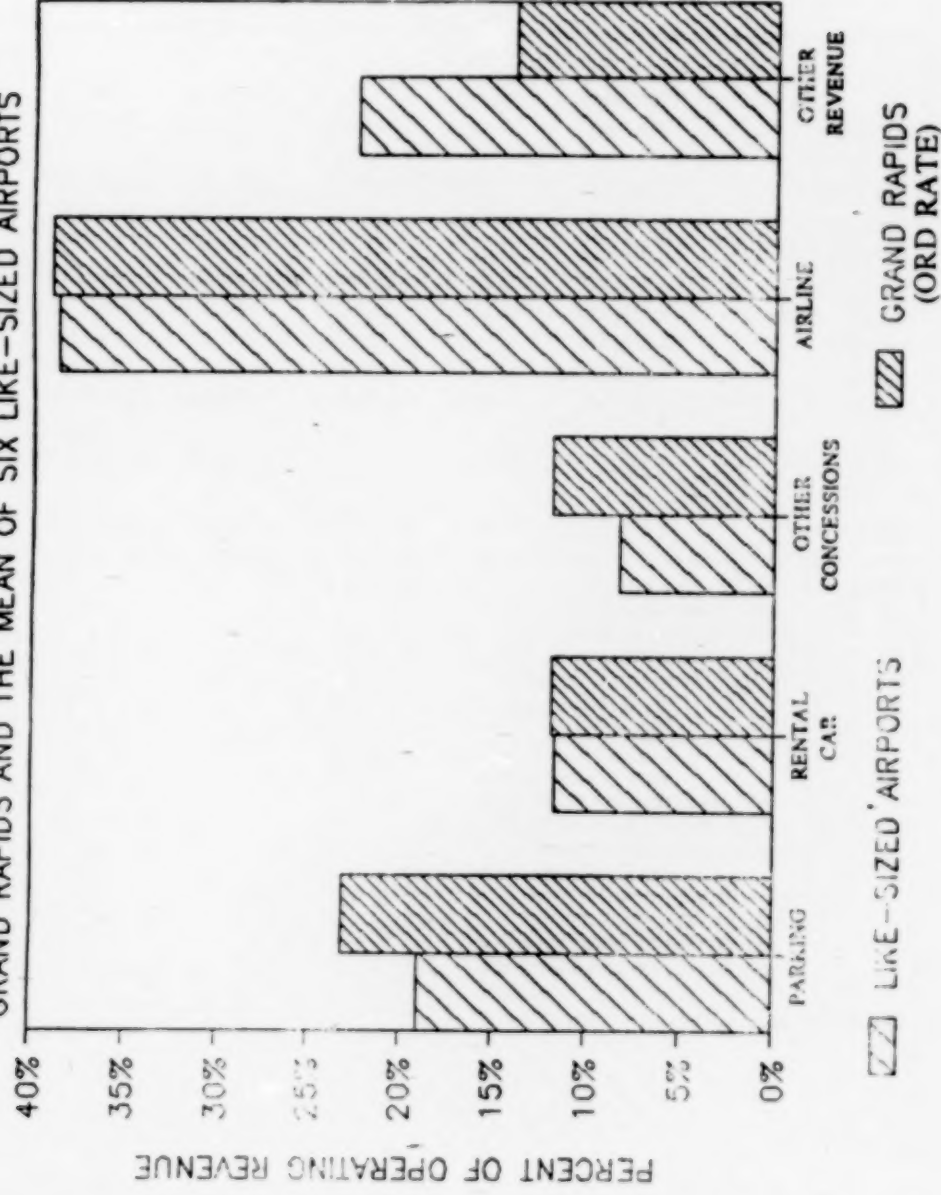
Airport	Operating Revenues	Interest Income	Total Revenues	Operating Expenses	Net Revenues	Net Revs As % of Total Revs
Des Moines	\$7,667,189	N/A	\$7,667,189	\$3,821,382	\$3,845,807	50.2%
Charleston	8,508,570	816,591	9,325,161	3,477,568	5,847,593	62.7
Colorado Springs	4,060,023	1,212,856	5,272,879	2,040,385	3,232,494	61.3
GRR- <u>Present</u>	5,943,107	657,497	6,600,604	3,784,286	2,816,318	42.7
GRR- <u>Ordinance</u>	6,519,580	657,497	7,177,077	3,784,286	3,392,791	47.3
Wichita	23,616,492	2,119,734	25,736,226	20,154,871	5,581,355	21.7
Spokane	7,320,613	222,063	7,542,676	5,104,452	2,438,224	32.3
Midland	4,559,193	N/A	4,559,193	2,774,893	1,784,300	39.1
MEAN	9,288,680	1,092,811	10,017,721	6,228,925	3,788,795.5	44.55
MEDIAN	7,493,901	1,014,723	7,604,932.5	3,649,475	3,539,201	44.65

SOURCE: Col. (1), (2) & (4) - DSM - Financial Summary by Year, FY1988.
 CHS - 1988 Annual Report, Exhibit "B".
 COS - Financial Statement, Dec. 31, 1988, pg. 92.
 GRR - Present - Financial Statement, Dec. 1988, pgs. 14 & 16.
 Ordinance - Present = \$5,943,107
 (Table 1) Less Airline Costs 1,967,445
 C-19-1-1029.02 3,975,662
 Plus Pro Forma Airline Costs 2,543,918
 Table 2A 1988 Pro Forma \$6,519,580
 ITC - Annual Report CY1988, Pg. 18.
 GEG - Financial Statement CY1988, pg. 17.
 MAF - Non-GAAP Statement
 Col. (4) - Expense less Debt Service

Col. (3) - Col. (1) plus Col. (2).
 Col. (5) - Col. (3) minus Col. (4).
 Col. (6) - Col. (5) divided by Col. (3).

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REVENUE CATEGORY AS % OF OPERATING REVENUE GRAND RAPIDS AND THE MEAN OF SIX LIKE-SIZED AIRPORTS



316

DEFENDANT'S EXHIBIT DA-43

REVENUES BY CATEGORY AS % OF TOTAL OPERATING REVENUES GRAND RAPIDS AND SIX LIKE-SIZED AIRPORTS CALENDAR OR FISCAL YEAR 1988

City	Enplaned Passengers	Parking Revenues	% of Total Operating Revenues	Rent-A-Car Revenues	% of Total Operating Revenues	Other Concessions Revenues	% of Total Operating Revenues	Airline Revenues	% of Total Operating Revenues	Other Revenues	% of Total Operating Revenues	Total Operating Revenues
DSM	3708,471	\$1,551,760	20.2%	\$753,766	9.9%	\$493,580	6.4%	\$3,690,625	48.1%	\$1,177,058	15.4%	\$7,667,189
CHS	662,392	1,422,232	16.7	1,321,939	15.5	374,002	4.4	3,571,940	42.0	1,818,157	21.4	8,508,570
COS	641,126	852,952	15.6	844,314	15.5	278,172	5.1	1,518,406	27.8	1,966,553	36.0	5,460,397
GRR-A	596,869	1,509,702	25.4	775,565	13.0	775,553	13.0	1,967,455	33.2	914,832	15.4	5,943,107
GRR-P	596,869	1,509,702	23.2	775,565	11.9	775,553	11.9	2,543,918	39.0	914,832	14.0	6,519,570
ITC	602,349	1,125,776	12.3	871,536	9.6	1,520,840	16.7	2,503,705	27.5	3,097,939	33.9	9,117,796
GEG	744,014	1,355,282	18.5	635,052	8.7	669,210	9.1	3,962,107	54.1	697,922	9.5	7,320,613
MAF	602,286	1,787,008	39.2	572,005	12.5	173,007	3.8	1,200,736	26.3	826,357	18.1	4,559,193
•MEAN	3,960,638	8,094,090	19.0	4,998,652	11.7	3,509,611	8.2	16,447,419	38.6	9,583,986	22.5	42,633,758
MEDIAN	651,759	1,392,257	18.7	799,040	10.7	434,191	5.8	3,037,772.5	40.5	1,497,607.5	20.0	7,493,901

NOTE: ¹ Less Aviation Fuel Sales.

DSM = Des Moines.

CHS = Charleston.

COS = Colorado Springs.

GRR-A = Grand Rapids-Actual.

GRR-P = Grand Rapids-Proforma.

ITC = Wichita.

GEG = Spokane.

MAF = Midland.

SOURCE: Col(1) - Airport Activity Statistics of Certificated Route Air Carriers, CY1988.

Col(2), (4), (6), (8), (10) & (12) - Audited Financial Statements and Financial Data provided by airports.

Col(3) - Col(2) divided by Col(12).

Col(5) - Col(4) divided by Col(12).

Col(7) - Col(6) divided by Col(12).

Col(9) - Col(8) divided by Col(12).

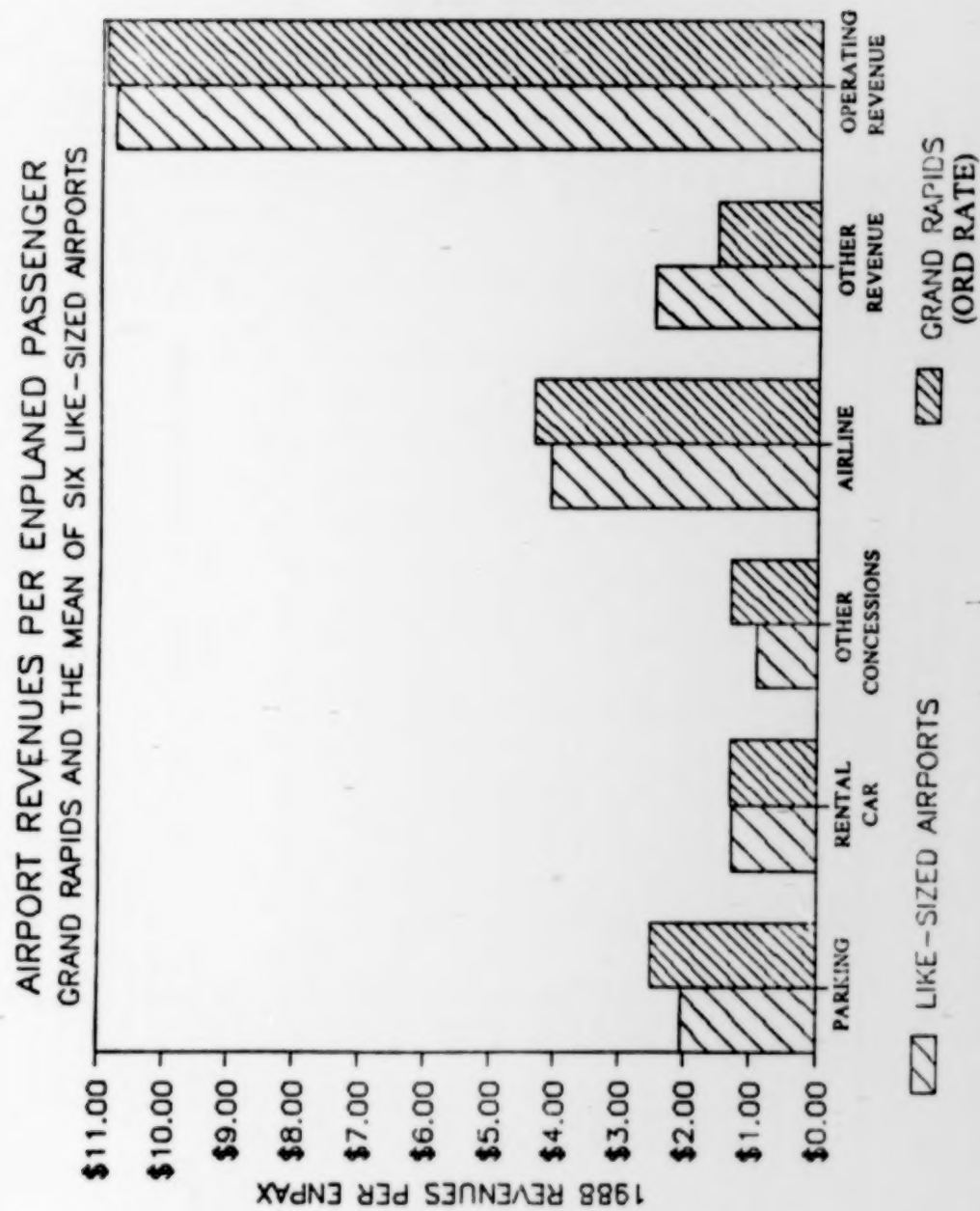
Col(11) - Col(10) divided by Col(12).

Col(13) - Col(12) divided by Col(12).

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317

DEFENDANT'S EXHIBIT DA-44



REVENUE PER ENPLANED PASSENGER
GRAND RAPIDS AND SIX LIKE-SIZED AIRPORTS
— CALENDAR OR FISCAL YEAR 1988

City	Revenues Per Enplaned Passenger					Total
	Parking	Rent-A-Car	Concessions	Airline	Other	
Des Moines	\$2.19	\$1.06	\$.70	\$5.21	\$1.66	\$10.82
Charleston	2.15	2.00	.57	5.39	2.74	12.85
Colorado Springs	1.33	1.32	.43	2.37	3.07	8.52
GRR - Actual	2.53	1.30	1.30	3.30	1.53	9.96
GRR - ProForma	2.53	1.30	1.30	4.33	1.53	10.92
Wichita	1.87	1.45	2.52	4.16	5.14	15.13
Spokane	1.82	.85	.90	5.33	.94	9.84
Midland	2.97	.95	.29	1.99	1.37	7.57
MEDIAN	\$2.01	\$1.19	\$.635	\$4.685	\$2.20	\$10.33
MEAN	2.04	1.26	.89	4.15	2.42	10.76

SOURCE: Enplaned Passengers & Revenues from attached table.

DEPOSITION EXHIBIT DX-I

UNITED AIRLINES

[Logo]

December 22, 1983

Mr. Robert Ross, A.A.E.
 Director of Aeronautics
 Kent County Int'l. Airport
 5500 44th Street, S.E.
 Grand Rapids, MI 49508

Dear Bob:

In response to your letter of December 14 on airline rates and charges for 1984, let me begin by expressing the airlines' appreciation for the work that Steve Turows did on the information package and also for the time that you and your staff took to review this proposal with us on December 16.

The representatives of United, Republic and Northwest have reviewed and are in agreement with your proposal for a one-year extension to bridge the period until the terminal expansion project is completed. We also agree with your proposal to set the building rental rates at \$18/sf and \$10.50/sf as outlined in your letter.

After a thorough review of all the materials presented, the carriers request that the landing fee rate for 1984 be set at 46¢ per thousand pounds of landing weight versus your proposal of 50¢ for the following reasons:

1. The detailed analysis performed by Steve Turows concluded that a rate of 44¢ was required. The airlines, using the same methodology and revenue requirement but adjusting the landed weight projection for United and Republic calculate a 46¢ fee as required.
2. The proposed rate of 50¢ is recognized as no rate increase over 1983. However, the landed weight fore-

cast for 1984 is approximately 25% over 1983, which will generate nearly \$200,000 more revenue even at the same rate. We believe this is more than the increase in revenue required. Also, we are all aware that when the 1983 rate was negotiated in late 1980, Grand Rapids was served by only United and Republic. The airlines should benefit from this large landed weight increase by a rate reduction as the airport and concessionaires have no doubt benefited by revenue increases in 1982 and 1983.

3. While the airport's desire to maintain a financial cushion due to the current instability of the air transportation industry is understood, we would point to the fact that the airport has a cash balance in excess of \$4 million to providing adequate security for any landed weight shortfall. We have also heard that American Airlines is planning to start service to Grand Rapids in early 1984.

Attached is a short list of requested revisions to the airline agreement handed out at our December 16 meeting for use by your legal counsel.

In summary, the airlines respectfully request that the 1984 landing fee rate be set at 46¢ per thousand pounds of landed weight as being a fair and equitable rate along with the rental rates proposed in your letter of December 14, and favorable consideration by the Kent County Aeronautics Board would be appreciated.

Very truly yours,

/s/ John Sorensen
 JOHN SORENSEN
 Chairman
 Grand Rapids AAAC

JS:jg
 Attch.

cc: Grand Rapids AAAC Members

DEPOSITION EXHIBIT DX-PP

	Total Landing Fee	Total Weight	Landing Fee Per 1,000 Lbs.	Total Passengers	Landing Fee Per Passenger
1981	\$442,152	884,304,000 #	.45	702,530	.57
1982	555,374	1,110,748,000 #	.477	740,226	.72
1983	756,115	1,512,228,000 #	.5056	989,808	.77
1984	732,906	1,465,812,000 #	.50	1,040,007	.70
1985	767,291	1,534,582,000 #	.50	1,197,060	.64
1986	810,202	1,620,404,000 #	.50	1,243,627	.65
1987	623,502	1,247,004,000 #	.50	1,141,255	.55

thru Oct.

No. 92-97

Supreme Court, U.S.
FILED

AUG 5 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC.,
USAIR, INC., AMERICAN AIRLINES, INC., and UNITED
AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS, and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR PETITIONERS

WALTER A. SMITH, JR.*
JONATHAN S. FRANKLIN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728

* Counsel of Record

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the Commerce Clause and the federal aviation laws permit the Nation's airports to assess user fees on airlines and passengers that charge the airlines substantially more than their fair share of the airports' costs, that produce revenues far in excess of those costs, and that deliberately discriminate against airlines in favor of local aviation.

2. Whether the Commerce Clause is automatically rendered inapplicable to an area of commerce whenever the Congress takes any action at all to regulate that area.

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CONSTITUTIONAL PROVISION:

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-97

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC.,
USAIR, INC., AMERICAN AIRLINES, INC., and UNITED
AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS, and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the Court of Appeals (J.A. 15) are reported at 955 F.2d 1054. The opinion of Chief Judge Merritt dissenting from the denial of *en banc* rehearing (Pet. App. 62a) is reported at 955 F.2d 1066. The opinion of the District Court granting judgment to respondents (Pet. App. 23a) is reported at 738 F. Supp. 1112. The opinions of the District Court denying petitioners' motions

for summary judgment and granting partial summary judgment to respondents (Pet. App. 41a, 47a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1992. That court's order denying a timely-filed petition for rehearing and suggestion for rehearing *en banc* was entered on April 16, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition for a writ of certiorari was filed on July 13, 1992, and granted on June 7, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3, provides, in pertinent part, that "The Congress shall have Power . . . to regulate Commerce . . . among the several States"

The Anti-Head Tax Act, 49 U.S.C. App. § 1513, provides, in pertinent part:

(a) *Prohibition; exemption*

No state (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom

(b) *Permissible State taxes and fees*

[N]othing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section . . . and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Section 2210 of Title 49 App., U.S.C. provides, in pertinent part:

(a) *Sponsorship*

As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination . . . ;

(9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible . . . ;

(12) all revenues generated by the airport, if it is a public airport . . . will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned and operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property

STATEMENT OF THE CASE

Petitioners ("the Airlines") are commercial passenger air carriers serving the Kent County International Airport, located near Grand Rapids, Michigan.¹ The Airlines brought this action against respondents Kent County, the Kent County Board of Aeronautics, and the Kent County Department of Aeronautics (collectively, "the Airport") asserting that the user fees imposed on them

¹ For petitioners' statements pursuant to Sup. Ct. Rule 29.1, see Petition for a Writ of Certiorari at ii. All parties to the proceeding are listed in the caption.

by the Airport violate the federal Anti-Head Tax Act, 49 U.S.C. App. § 1513, and the Commerce Clause.² The Airlines contended that the Airport's fees are unreasonable under both of those provisions because they extract revenues that are out of all proportion to the Airlines' fair share of the Airport's costs, because they create enormous Airport surpluses far in excess of its costs, and because they deliberately discriminate against the Airlines in favor of local aviation. The Court of Appeals upheld the bulk of the challenged fees and the Airlines now urge this Court to reverse that judgment.

I. THE CHALLENGED FEES

The Kent County International Airport is a public entity owned by Kent County and operated by the Kent County Board of Aeronautics and the Kent County Department of Aeronautics. J.A. 16. The Airport derives much of its revenue from user fees imposed on the entities who use and benefit from the Airport's facilities. However, those fees are not based on a methodology designed to approximate each user's benefits; nor are the fees set at levels intended to make the Airport merely "self-sustaining." See 49 U.S.C. App. § 2210(a)(9) (1988).

Instead, as explained below, the Airport's fee methodology (1) charges the Airlines far more than their fair share of the Airport's costs; (2) imposes fees calculated to earn a substantial surplus greatly in excess of the Airport's costs, including all costs of operation, maintenance, debt service, and other capital expenditures; and (3) discriminates against the Airlines in favor of local aviation. This fee methodology has generated large cash surpluses for the Airport, surpluses which had risen to more than \$9 million by the end of 1989, and which are projected to rise, at a minimum, to over \$19 million by

² The Airlines also challenged the fees under Michigan state law, a challenge that is not before this Court.

the end of this decade. These reserves amount to more than 127% and 268%, respectively, of the Airport's 1989 revenues. See *infra* note 12.

A. The Airport's Fee Methodology

The Kent County International Airport uses a methodology devised by a consultant, James E. Buckley, to determine the fees to be imposed on the Airport's users. See Pl. Ex. 20 (J.A. 223). This "Buckley methodology" first divides the Airport into three general groups of users: (1) the commercial Airlines, (2) general aviation (which consists of corporate and privately-owned aircraft not used for commercial, passenger, cargo, or military service), and (3) the non-aeronautical concessions (which include car rental agencies, the parking lot, restaurants, gift shops, "rent-a-cart" facilities, and other small vendors). J.A. 17.³ The methodology then purports to allocate to each group the Airport's costs of providing benefits to that group.

In allocating costs, however, the Airport's methodology assumes that only the Airlines and general aviation benefit in any way from the costs of the Airport's "air operations," such as runways and landing operations. As a result, the concessions are allocated none of the costs of the air operations,⁴ even though those operations create the concessions' customer flow and are therefore an enormous benefit to them. Indeed, it is undisputed that because the air passengers are in fact the concessions' customers, the concessions would not exist *at all* were it not for the air operations.⁵ The Airport also

³ The parking lot is owned by the Airport itself, a point that is not material for purposes of this brief.

⁴ See Pl. Ex. 6 at 3-4 (J.A. 199-201).

⁵ See, e.g., Trial Testimony of Charles T. Horngren ("Horngren Testimony") at 592 (J.A. 107-08) (Mr. Horngren, an endowed chair

allocated 100% of its crash, fire, and rescue ("CFR") costs to the Airlines, even though general aviation and the concessions also benefited greatly from those operations. Pet. App. 30a.⁶

Having thereby overallocated costs to the Airlines in relation to the concessions, the Airport then completely ignores its own cost allocations when setting fees for all users *except* the Airlines. Pet. App. 27a-28a. Thus, the Airlines are charged user fees based solely on the theoretical costs which the Airport says should be allocated to them. These fees, which amounted to nearly \$2 million in 1988, are then largely passed on to the Airlines' passengers through ticket prices.⁷

By contrast, however, the fees charged the concessions and general aviation bear no relation whatsoever to those users' allocated costs. Thus, the Airport completely ignores the concessions' theoretical allocated costs and instead charges them actual fees that produce revenues for the Airport far exceeding those allocated costs. Pet. App. 29a. For example, the rental car agencies (the largest concessions) are charged 10% of their gross receipts. The result is that although the rental car agencies were theoretically allocated only \$28,000 in costs per year, the fees actually imposed on them generated revenues for the Airport of more than \$675,000—equating to an astounding 2300% "profit" for the Airport over its

professor of accounting at Stanford University, testified as an expert witness for the Airlines); Trial Testimony of Richard K. Dompke ("Dompke Testimony") at 140 (J.A. 66) (Mr. Dompke, a retired consultant, is a cost accounting expert who testified for the Airlines).

⁶ Indeed, "the vast majority of [CFR] runs do not involve air carrier aircraft." Deposition Testimony of Robert M. Ross ("Ross Deposition") at 98 (J.A. 53) (Mr. Ross has been Director of Aeronautics for the Airport since 1963).

⁷ See J.A. 25; Horngren Testimony at 541 (noting relationship between airline fees and ticket prices) (J.A. 99).

theoretical costs. *Id.* Similarly, the Airport allocated to the parking lot only \$688,000 in costs, but generated fee revenues from that concession of approximately \$1,600,000. *Id.*

This enormous disparity between the Airport's theoretical allocation of costs to the concessions and the actual revenues derived from them is easily explained by two facts. First, the theoretical allocations are artificially low because they attribute none of the costs of the air-operations to the concessions. Second, because those operations create the concessions' customer flow, the concessions are willing to pay fees far in excess of those allocated costs in order to obtain access to that flow.

The result of the Airport's fee methodology is to generate huge surpluses because the Airport necessarily recovers its costs several times over—once from the Airlines, who bear virtually all of the air-operations costs, and a second time from the concessions, who pay fees in excess of their allocated costs. And the surpluses are all generated at the expense of the Airlines and their passengers because, as one of the Airport's expert witnesses admitted, the concessions pass their fees to their customers, who are in fact the Airlines' passengers.⁸

The Airport then adds further to its surplus each year by including, in the costs it allocates to the Airlines and other users, a mythical "carrying charge" on all locally-funded capital assets. Specifically, rather than simply allocating depreciation costs over the useful life of such assets, which would recover only the actual cost of the assets by the end of that period, the Airport assumes that

⁸ See Trial Testimony of John F. Brown ("Brown Testimony") at 950 (agreeing that "concession revenue . . . is derived, directly or indirectly, from the airline passengers") (J.A. 172) (Mr. Brown, a private consultant in the field of airport finances and management, testified for the Airport); see also Appellee Airport's Brief 5 (airline passengers "constitute the primary consumers generating the non-aeronautical (concession) revenue . . .").

each asset was purchased with a non-existent 25- or 30-year mortgage. It then charges users a non-existent 8% "interest" rate over that mortgage period (plus a ½% "maintenance" fee).⁹ As the Airlines showed at trial, these carrying charges result in Airport users being charged two to three times the cost of capital assets, with the difference being added to the Airport's growing surpluses. See Dompke Testimony at 194 (J.A. 82).

Based on all the foregoing, the Airport continues, year after year, to accumulate substantial surpluses far in excess of its costs. Even under the lower rates it imposed prior to 1988, the Airport recorded over \$1,900,000 in surplus revenues in 1987, over \$1,600,000 in 1988, and over \$1,700,000 in 1989,¹⁰ resulting in an accumulated cash reserve that exceeded \$9,000,000 by the end of 1989. Pet. App. 30a. And as the Airlines established at trial, this reserve will rise to more than \$19,000,000 by the end of this decade, even accounting for *all* of the Airport's operations, maintenance, debt service, and other capital costs—including *every* conceivable capital project the Airport was able to imagine for the future, the vast majority of which had not received required state and federal approvals.¹¹ These surpluses are substantial given

⁹ See J.A. 29; Pl. Ex. 6, Exs. 5 & 7 thereto (J.A. 212-13, 216-19); Dompke Testimony at 141-47 (J.A. 67-70).

¹⁰ See Pl. Exs. 301 & 355 (J.A. 278, 279).

¹¹ Trial Testimony of Brian Picardat ("Picardat Testimony") at 847-58 (accounting for all contemplated capital expenditures) (J.A. 130-38) (Mr. Picardat is the Director of Finance for the Kent County Aeronautics Board); Trial Testimony of Harold Pederson at 774-77 (J.A. 123-26) (Mr. Pederson is the Deputy Director of the Kent County Aeronautics Board). This figure, moreover, does not account for any additional revenue that might be generated by the new capital expenditures, or for the fact that these new expenditures would be included in the Airport's rate base and thereby charged back to the users. See Picardat Testimony at 855-56 (J.A. 136-37). Nor does it account for possible revenues from "passenger facility charges," see *infra* at 15, a new source of airport funding that had not been approved by Congress by the time of trial.

the Airport's size; the 1989 surpluses, for example, equaled 25% of the Airport's total revenues under pre-1988 rates, and 30% under higher rates that were to become effective in 1988.¹²

Significantly, the Airport had no explanation or plan for these enormous surpluses, which under federal law must be used for airport purposes and must be only in amounts necessary to make the Airport "self-sustaining." See 49 U.S.C. App. § 2210(a)(9), (12) (1988). Indeed, the sole evidence of record on this point is the statement of one of the Airport's witnesses that he did not know what the excess funds could be used for, and the speculation of another that the funds might serve as "a wonderful contingency fee" in case an earthquake were to occur at Grand Rapids.¹³

Finally, as it does with the concessions, the Airport ignores its own cost allocations when setting fees on general aviation. Instead, it charges fees to general aviation that recover only 20% of the costs that the Airport's own methodology indicates should be allocated to that group. J.A. 26.¹⁴ As a result, while the Airport's most

¹² See Pl. Ex. 355 (J.A. 279). The 1989 accumulated surplus and the projected surplus for the end of this decade are more than 127% and 268%, respectively, of the Airport's total 1989 revenues as calculated under the old rates. See *id.* (revenue figures).

¹³ See Picardat Testimony at 858 (J.A. 138); Trial Testimony of Ferdinand K. Levy ("Levy Testimony") at 1003 (referring to San Francisco earthquake of 1989) (J.A. 190) (Mr. Levy, a professor of economics at the Georgia Institute of Technology, testified as an expert witness for the Airport).

¹⁴ This is done by charging locally-based general aviation only a flat fuel flowage fee of 4 cents per gallon, and by charging "itinerant" general aviation (aircraft based elsewhere) a landing fee. Pet. App. 29a. The Airport has characterized the fuel flowage charge as a "landing fee for the local-based aircraft." Trial Testimony of Robert M. Ross ("Ross Testimony") at 739 (J.A. 118). The fuel flowage fee for local aircraft, which was 3 cents per

recent fee study allocated \$650,000 in costs per year to general aviation, the fees actually imposed on that group bring in less than \$125,000 in revenue. Pet. App. 29a.

B. The Parties' Disagreement Over the Methodology

From the late 1960s to December 31, 1986, the Airport and the Airlines periodically negotiated fee agreements. In 1986, however, the Airport generated a new rate study (based on the Buckley methodology) that would have substantially increased the Airlines' rates and fees beginning January 1, 1987. The Airlines objected to the new rates and fees and, when the parties could not reach an agreement on them, the Airport passed an ordinance unilaterally increasing them. See J.A. 17. These new, higher "Ordinance Rates" were scheduled to become effective on April 1, 1988. Accordingly, on that date the Airlines filed the present suit, asserting that both the new Ordinance Rates and the prior rates were unreasonable as a matter of law.

II. STATUTORY BACKGROUND

Due to the importance of air travel to the Nation's economy and the potential threat that local airport fees pose to that travel, both Congress and this Court have established requirements ensuring that such fees are fair and reasonable.

A. Federal Airport Funding

The federal government has long been intimately involved in local airport financing. In 1970, Congress passed the Airport and Airway Development Act ("AADA") to provide federal assistance for state and

gallon in 1963, has remained at 4 cents since 1967, even though Mr. Buckley had recommended a 12% increase in his initial study. During this same period, the Airlines' landing fees increased by 300%. See Ross Testimony at 719 (J.A. 117); Dompke Testimony at 175 (J.A. 80).

local airport development, assistance that has continued ever since.¹⁸ The primary source of that assistance is a federal tax, currently 10%, on all domestic airline tickets. See 26 U.S.C. § 4261 (Supp. 1990). Shortly after enactment of the AADA, the Airport at Grand Rapids obtained a \$6,000,000 grant to finance capital improvements, and has been a steady recipient of federal funds since then. See Ross Testimony at 667-72 (J.A. 112-16).

In return for such federal assistance, however, Congress requires that an airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and "will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible" 49 U.S.C. App. § 2210(a)(1), (9) (1988). Further, recognizing the incentive for localities to use airport fees as a means of funding general public expenditures, Congress has also required that all airport revenues "be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned and operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property." *Id.* § 2210(a)(12).

B. The Evansville Decision

This Court, as well, has acted to ensure that local airports not impose unreasonable fees on airport users. In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Court reviewed Commerce Clause challenges to user fees imposed on passengers by local airports in Indiana and New Hampshire. The Indiana ordinance had imposed a

¹⁸ See AADA of 1970, Pub. L. No. 91-258, 84 Stat. 219 (repealed 1982); Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88; Airport and Airway Improvement Act of 1982 ("AAIA"), Pub. L. No. 97-248, 96 Stat. 671.

one dollar charge on every passenger enplaning a commercial aircraft, and the New Hampshire law had required every regularly-scheduled commercial air carrier to pay either one dollar or fifty cents per passenger, depending on the weight of the aircraft. *Id.* at 709-10. Various airlines challenged these "head taxes" as being an unreasonable burden on interstate commerce and therefore impermissible under the Commerce Clause.

In response, this Court applied a three-part test, based on prior cases, to determine the reasonableness of the challenged fees. First, airport fees must be "based on some fair approximation of use or privilege for use." *Id.* at 716-17. Second, they must not be "discriminatory against interstate commerce." *Id.* at 717. And third, they must not be "excessive in comparison with the governmental benefit conferred." *Id.*

The Court found that the challenged fees satisfied all three tests and so upheld them. First, even though the fees distinguished among certain kinds of users, the Court found them to be a "fair . . . approximation of the use of facilities for whose benefit they are imposed" (*id.*) because the distinctions were shown to be related to differential use of airport facilities. *Id.* at 718-19. Second, the Court found no discrimination against interstate commerce because "both interstate and intrastate flights are subject to the same charges." *Id.* at 717. And third, the Court found that the fees were not "excessive in relation to costs incurred by the taxing authorities" because the revenues generated would not "do more than meet . . . past, as well as current, deficits." *Id.* at 719, 720.

The Court further held that the fees did not conflict with Congress' policy, as expressed in the AADA, that local airports be permitted to "levy charges designed to help defray the costs of airport construction and maintenance" through a fee structure "which will make the airport as self-sustaining as possible" *Id.* at 721

(quoting Section 18(8) of the AADA) (current version at 49 U.S.C. App. § 2210(a)(9)).

C. The Anti-Head Tax Act

Congress, however, disagreed with the result reached in *Evansville* and in 1973 imposed even stricter fee standards on airports in what is commonly referred to as the Anti-Head Tax Act ("AHTA"). See Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, § 7, 87 Stat. 90 (codified as amended at 49 U.S.C. App. § 1513).

The AHTA outlawed all direct or indirect state and local fees on air travel except certain fees specifically exempted from statutory regulation. Specifically, under the AHTA:

(a) No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom

(b) [N]othing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section . . . and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 U.S.C. App. § 1513(a), (b) (1988).

The legislative history of the AHTA makes its purpose clear. Congress believed that the *Evansville* decision "[did] not provide adequate safeguards to prevent undue or discriminatory taxation," and intended to "ensure that passengers and air carriers will be taxed at a uniform

rate—by the United States—and that local ‘head’ taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.” S. Rep. No. 12, 93d Cong., 1st Sess. [hereinafter “Senate Report”], reprinted in 1973 U.S.C.C.A.N. 1434, 1446, 1435. Congress was furthermore concerned that head tax revenues “would not be earmarked for airport development, but would be used to gain financial windfalls.” *Id.* at 1446. Like this Court in *Evansville*, 405 U.S. at 714-15, Congress also deemed it irrelevant whether the taxes are paid by the passenger or by the airline, noting that “[w]hether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel,” because “[i]n the end, a fare increase would have to be implemented.” Senate Report, 1973 U.S.C.C.A.N. at 1451.

Significantly, the AHTA was enacted as part of the Airport Development Acceleration Act of 1973 (“ADAA”), whose other main purpose was to increase the level of federal airport funding derived from the federal ticket tax on passengers. This increased funding on the one hand and the limitations on state taxes on the other were inextricably linked, Congress intending that “the two actions must be viewed together and that neither should stand alone without the other.” *Id.* at 1455. In sum, Congress concluded that local taxes were generally “inimical to the development of a national system funded in large part by uniform Federal taxes” and “never intended that air travelers would be subject to state and local head taxes as well as to national user charges.” *Id.* at 1455, 1450. Rather, in light of the ADAA’s increased federal funding, Congress believed that “state and local head taxes to raise funds for airport development can be precluded, for they should not be necessary.” *Id.* at 1451. In fact, in Congress’ view, “state and local head taxes constitute an inequitable, double burden of taxation of air passengers.” *Id.* at 1450.

In 1990, after the trial in this case, Congress amended § 1513 to permit local airports, with the express approval of the Secretary of Transportation and after consultation with air carriers, to assess “passenger facility charges (PFCs)” of one, two or three dollars per passenger, provided the revenues are earmarked for specific federally-approved capital projects.¹⁶ This legislation confirms Congress’ continuing intention to subject airport user charges to stringent controls to ensure that those charges are reasonable and are imposed and used only for necessary airport improvements.

III. THE COURT CHALLENGES

A. The *Indianapolis* Decision

This case was not the first challenge to the fee methodology at issue, but rather was decided against the backdrop of the decision in *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984). There, the Court of Appeals for the Seventh Circuit confronted a challenge to fees nearly identical to those at issue here, and unanimously invalidated those fees as unreasonable.

The Court did so on the same three grounds now being urged by the Airlines in this case. Judge Posner, writing for himself and Judge Coffey, concluded that the fees at issue were not “reasonable” within the meaning of the AHTA because:

When concession rentals . . . that are more than three times the cost that [the airport] itself allocates to the

¹⁶ See Aviation Safety and Capacity Expansion Act of 1990, Pub. L. No. 101-508, tit. IX, § 9110, 104 Stat. 1388-357 (codified as amended at 49 U.S.C. App. § 1513(e)). In 1982, Congress also amended § 1513 to specify certain taxation practices, not implicated in this case, which Congress found unreasonably burdened or discriminated against interstate commerce. See AAIA, Pub. L. No. 97-248, tit. V, § 532, 96 Stat. 701 (codified at 49 U.S.C. App. § 1513(d)).

concessions are added to the airline user fees . . . the result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers, and is therefore unreasonable . . .

Id. at 1268. The majority also found the airport's fees unreasonable under the AHTA because they discriminated against the airlines in favor of local general aviation. *Id.* at 1271.

Judge Flaum also found the airport's fees unreasonable, but for a different reason.¹⁷ In his view, the fees were unreasonable because they allocated all of the air-operations costs to the airlines and none to the concessions, thereby necessarily overcharging the airlines. As he wrote:

The dependence of the nonaeronautical users on the airlines to produce customers means that those users receive a substantial benefit from the airlines. The costs of producing that benefit, however, are borne entirely by the airlines.

Id. at 1276.

B. The District Court Opinions

In rejecting the *Indianapolis* decision and ultimately upholding the nearly identical fees presented here, the District Court in this case issued three opinions. See Pet. App. 23a-59a. In its first opinion, denying cross-motions for summary judgment, the Court held that the Airport's fees were not *per se* unreasonable because the methodology did not *on its face* require Airport users to pay more than necessary for maintenance and develop-

¹⁷ Judge Flaum declined to address the AHTA issue, holding that the fees were unreasonable under state law, which likewise imposed a "reasonableness" requirement on airport fees. *Id.* at 1274. However, he did not find that the federal reasonableness requirement should be interpreted any differently, preferring not to reach that issue. *Id.* at 1274 n.5.

ment. *Id.* at 57a. The Court, however, left open the possibility that the Airport's fees might be unreasonable as applied in practice.

In its second opinion, the Court held, in accord with every other court that has addressed the issue, that the Airlines have a private right of action to challenge the reasonableness of the Airport's fees under the AHTA. *Id.* at 43a-44a. The Court then granted partial summary judgment to the Airport on the Airlines' Commerce Clause claim, holding that constitutional review was unavailable once Congress had acted under the AHTA. *Id.* at 46a. The Court therefore ordered the parties to proceed to trial on the question of whether the Airport's fees, as applied in practice, are unreasonable under the AHTA.

After a seven-day bench trial, the Court issued its final opinion and order upholding the bulk of the challenged fees. Even though the Court found itself "troubled by such large surpluses generated by the Airport" (*id.* at 39a), the Court upheld all of the Airport's fees, except its overnight parking charges. The Court held that these latter fees were unreasonable because, even under the Airport's own cost allocation system, the Airlines were being charged more than five times the amount of their allocated overnight parking costs. *Id.* at 38a.

In upholding the remainder of the fees, the Court "decline[d] to follow" *Indianapolis* (*id.* at 35a), but also purported to distinguish that decision on the ground that the airport in that case enjoyed a locational monopoly while the Kent County Airport somehow does not. To reach that conclusion, the Court took "judicial notice" of the fact that there are two other airports about an hour from Grand Rapids. *Id.* at 33a. In so holding, however, the Court ignored unrebutted expert trial testimony that the Kent County Airport is in fact a "natural monopoly." Horngren Testimony at 551, 557 (J.A. 104).

C. The Court of Appeals Opinions

The Airlines appealed to the Court of Appeals for the Sixth Circuit which, through three separate opinions, affirmed that judgment in nearly all respects.

Thus, the Court first rejected Judge Posner's holding in *Indianapolis* that airport fees which are out of all proportion to airport costs are necessarily unreasonable under the AHTA. Instead, the panel reasoned that because concession fees "are not within the scope of the AHTA," the Airport's huge surpluses are irrelevant to whether the fees charged to the Airlines are unreasonable. J.A. 23-25. In addition, the Court upheld the Airport's mythical "carrying charges," finding it reasonable for the Airport to earn a "return on its investment" by imposing fees on the Airlines "similar in scope to the interest charged by a financing institution." *Id.* at 29.

The Court also rejected Judge Flaum's view that it is unreasonable for the Airport to allocate none of its air-operations costs to the concessions even though the concessions reap substantial benefits from those operations. *Id.* at 25-26. Yet in doing so, the Court did not even address the misallocation of *air-operations* costs, holding only that the Airlines had not proven that 100% of the *terminal building* common areas had been allocated to the Airlines. *Id.*

Finally, the Court (through Judges Contie and Nelson) held that it was reasonable for the Airport to discriminate against the Airlines in favor of local general aviation. *Id.* at 32-34. Judge Kennedy dissented on this point, as she agreed with the Seventh Circuit in *Indianapolis* that "[t]his is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act." *Id.* at 27 (quoting *Indianapolis*, 733 F.2d at 1271).

The Court struck down only one portion of the challenged fees: Judges Kennedy and Contie agreed with the Airlines that it was unreasonable under the AHTA

for the Airport to allocate all of its crash, fire, and rescue ("CFR") service costs to the Airlines, as those services also produce a "substantial benefit" to general aviation and the concessions. *Id.* at 27-28. Thus, even though a majority of the panel assessed the reasonableness of the CFR cost allocation according to the benefits *actually received* by the various other Airport users, the panel inexplicably failed to apply that same standard in assessing the Airport's refusal to allocate *any* of the air-operations costs to the concessions.

Having rejected the Airlines' main contentions under the AHTA, the Court then refused even to consider their contentions under the Commerce Clause, holding that such review was no longer available after enactment of the AHTA. *Id.* at 30-31. Specifically, the Court held that the "courts should only undertake a Commerce Clause review of a tax or regulation if Congress ha[s] taken no other action to regulate the area" (*id.*), and finding that the AHTA constituted some "action" in the "area" of airport fees, the Court declined to entertain the Airlines' Commerce Clause challenge.

Following the decision of the Court of Appeals, the Airlines filed a timely petition for a writ of certiorari, questioning the reasonableness of the Airport's fees under both the federal statutes and the Commerce Clause. The Airport filed no cross-petition.¹⁸

¹⁸ Thus, the Airport could have, but did not file a cross-petition challenging the Court of Appeals' holding that the Airport's CFR cost allocation was unreasonable, nor its holding that the Airlines have a private right of action under the AHTA (J.A. 18-19), which was a necessary predicate to its holding on the CFR issue. Accordingly, neither of these issues is before the Court. See *Air Courier Conference of America v. American Postal Workers Union*, 111 S. Ct. 913, 917 & n.3 (1991) (Court would not decide whether statute embodied Congress' intent to allow cause of action, as question "was not raised . . . in [the] petition for writ of certiorari, nor is it encompassed by the questions presented upon which we based our grant of certiorari"); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) (Court was "without

SUMMARY OF ARGUMENT

In enacting the AHTA, Congress sought to ensure that airports charge only those fees that fairly approximate the benefits received by each airport user, that earn no more than necessary to make the airport "self-sustaining" without generating "financial windfalls," and that do not unjustly discriminate among users. The fees at Grand Rapids are unreasonable on all of these grounds. Those fees are furthermore unreasonable under the standards set forth by this Court in *Evansville*, in that they (1) charge the Airlines substantially more than their fair share of the Airport's costs; (2) generate large profits far in excess of those costs, and (3) intentionally discriminate against the Airlines in favor of local general aviation.

Moreover, even if the fees were to be found reasonable under the AHTA, the Court of Appeals erred in rejecting the Airlines' separate Commerce Clause challenge. This Court has squarely held that Commerce Clause review is available unless Congress has "expressly stated" otherwise with an "unmistakably clear" intent. In enacting the AHTA, Congress expressed no such intent. To the

jurisdiction" to consider issue, because "[a]n argument that would modify the judgment . . . cannot be presented unless a cross-petition has been filed"); *County of Los Angeles v. Davis*, 440 U.S. 625, 630 n.3 (1979) ("[R]espondents did not cross petition for modification of the judgment of the Court of Appeals reversing the District Court The issue . . . , as a consequence, is not properly before us"); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) ("the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted") (emphasis supplied); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970) ("Since reversal of the Court of Appeals' ruling on this question would not dictate affirmance of that court's judgment . . . but rather elimination of petitioners' rights thereunder, we will not consider the question in these circumstances"); Sup. Ct. Rule 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court").

contrary, Congress sought in that statute to set a *stricter* standard for airports than this Court had applied under the Commerce Clause in *Evansville*, not to approve fees that would otherwise violate that Clause. And here, when the operations of the concessions are taken into account under the Commerce Clause, it is clear under *Evansville* that the resulting fees unreasonably burden the Airlines and their passengers. This renders them unconstitutional.

ARGUMENT

I. THE AIRPORT'S FEES VIOLATE THE ANTI-HEAD TAX ACT

Under the AHTA, an airport may not "levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce," except for "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. § 1513(a), (b) (1988) (emphasis supplied). The AHTA, therefore, prohibits all "unreasonable" user fees on aircraft operators.

Although Congress did not expressly define what it meant by "reasonable" user fees, the AHTA's legislative history demonstrates that Congress intended for the reasonableness standard to be at least as strict (if not stricter) than that applied in *Evansville*. For Congress enacted the AHTA precisely because it believed *Evansville* had permitted airports *too much* discretion to impose charges on airport users. Thus, Congress banned nearly all local airport charges, allowing only for the "continuation" of reasonable user fees on aircraft operators. See Senate Report, 1973 U.S.C.C.A.N. at 1436. At a bare minimum, therefore, Congress intended for those fees to be measured by and to pass the *Evansville* standard that prevailed prior to the AHTA. See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (when enacting

statutes, unless Congress indicates to the contrary it is presumed to have adopted prior judicial opinions).

The *Evansville* standard, moreover, is a clear, easily-applied test which has long remained the law for measuring the reasonableness of user fees under the Commerce Clause, and is one this Court has extended to other areas as well.¹⁹ It is furthermore the standard that both the Court of Appeals and the Airport have agreed the present airport user fees must meet to be valid under the AHTA.²⁰ Under that standard, to be "reasonable" an airport's user fees (1) must be "based on some fair approximation of use or privilege for use"; (2) must not be "excessive in comparison with the governmental benefit conferred"; and (3) must not be "discriminatory." *Id.* at 716-17. It was in fact to achieve these same goals that Congress regulated airport fees even more strictly through the AHTA.²¹

For all these reasons, therefore, the *Evansville* standard should serve as the baseline against which to measure the "reasonableness" of fees under § 1513(b). And as explained below, when construed in light of Congress'

¹⁹ See *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 289-90 (1987) (applying *Evansville* standard); *Massachusetts v. United States*, 435 U.S. 444, 466-67 (1978) (extending *Evansville* standard to evaluate reasonableness of aviation user fees under intergovernmental tax immunity doctrine).

²⁰ See J.A. 25 (applying *Evansville* standard under AHTA); Brief of All Respondents in Opposition to Petition for Writ of Certiorari 26 (AHTA and Commerce Clause standards are "functionally equivalent").

²¹ See 49 U.S.C. App. § 1513(b) (1988) (AHTA prohibits all fees on aircraft operators except reasonable fees "for the use of airport facilities"); Senate Report, 1973 U.S.C.C.A.N. at 1446 (expressing concern that head tax revenues "would be used to gain financial windfalls"); *id.* (stating that *Evansville* "[did] not provide adequate safeguards to prevent undue or discriminatory taxation").

overall intent in enacting the AHTA, the Airport's fees violate *all three* of *Evansville*'s requirements.²²

A. The Airport Unreasonably Overcharges the Airlines for Their Use of Airport Facilities

The first requirement for "reasonable" airport user fees is that they be "based on some fair approximation of use or privilege for use." In other words, they must relate in some way to "the use of facilities for whose benefit they are imposed." *Evansville*, 405 U.S. at 716, 717 (emphasis supplied). See also *Massachusetts v. United States*, 435 U.S. at 467 (user fee must be "a fair approximation of the cost of the benefits civil aircraft receive"). Thus, as Judge Flaum determined in *Indianapolis*, in order to reasonably reflect the differences in the extent of use of airport facilities by different users, "the amount of the fee charged must relate to the benefits supplied to the user, measured according to the costs incurred in supplying the benefits." 733 F.2d at 1276.

But the Airport's cost allocation methodology bears no relation whatsoever to the benefits actually received by the various Airport users. Instead, as noted, the concessions are allocated *none* of the Airport's substantial air-operations costs, even though the evidence of record establishes the common-sense proposition that those concessions are huge beneficiaries of the air-operations. Indeed, the record establishes that the concessions are entirely dependent on the air operations for their customer flow, and *would not even exist at all* were it not for those operations.²³ The record also establishes that

²² Because a fee must meet all three of these requirements to be reasonable, the violation of any one would be sufficient to invalidate the Airport's fees. However, because invalidation of the fees under each of these grounds would have somewhat different consequences for the Airlines and the Airport, the Airlines urge the Court to invalidate the Airport's fees on all three grounds.

²³ See, e.g., Dompke Testimony at 140 (the airport "parking lot wouldn't exist if it were dissociated from the roadways and the

the fees the concessions actually pay are simply economic payment for access to the passenger flow created by the air operations.²⁴ It is patently unreasonable, therefore, for the Airport to assess *all* the costs of those operations on the Airlines and general aviation and none on concessions. As Judge Flaum explained, the Airport's approach "ignores the costs of producing the customer flow" to the concessions, *i.e.*, the costs of the air operations. 733 F.2d at 1276 n.9.²⁵

Thus, rather than allocating costs to the concessions based on some "fair approximation" of the benefits they receive, the Airport instead allocates to them only a small percentage (24%) of the *terminal area* costs, based

landing field") (J.A. 66); *id.* at 167 (parking lot is "[c]ompletely" dependent on airfield and terminal) (J.A. 78); Horngren Testimony at 592 ("[i]f the airlines weren't there, there would be no concessionaires there") (J.A. 108). The reverse is not true, however, as the Airlines would obviously continue to operate even absent the concessions.

²⁴ See Dompke Testimony at 159 (concessions are "paying for the access to the passengers") (J.A. 74); Deposition of Charles W. Seaman at 119 (rental car companies are paying "for access to the flow of passengers") (J.A. 64) (Mr. Seaman is a former rental car agency executive in charge of airport rental facilities); Levy Testimony at 1019 (J.A. 191); Horngren Testimony at 475 (J.A. 91-92).

²⁵ The Court of Appeals completely mischaracterized the Airlines' argument on this point, stating that the Airlines had asserted that 100% of the terminal building common areas had been charged to them. The Airlines made no such assertion, but rather noted only that the Airlines are charged the vast majority of the common area costs, based on a square-footage formula. See Brief of Appellants at 29 n.46. This allocation is unreasonable, regardless of whether all—or merely most—of the common area costs are borne by the Airlines, as it ignores the substantial benefit the concessions derive from the passenger flow through the common areas. And more importantly, irrespective of whether it is reasonable for the Airport to allocate terminal costs based on relative floor space occupancy, the Court of Appeals completely ignored the Airlines' main point, which is that the Airport allocates the concessions *none* of the substantial costs of the air operations.

entirely on the relative amount of square footage they occupy in the terminal.²⁶ Then, having allocated costs based only on a few square feet of terminal-area space, the Airport thereafter ignores that allocation in the *actual fees* it charges the concessions. It instead charges the concessions actual fees vastly in excess of their respective theoretical allocations, generating revenues that necessarily could not be produced solely by the limited costs related to the square footage the concessions actually occupy. For example, the rental car agencies pay fees that are more than 24 times the costs that the Airport allocates to them (*see supra* at 6), demonstrating again that the fees they are actually charged are in fact payment for access to the passenger flow.²⁷

Plainly, the Airport intended through this approach to unfairly shift virtually all of its air-operations costs to the Airlines and charge them accordingly, and then, because this misallocation necessarily understated the costs fairly attributable to the concessions, the Airport simply ignored the resulting allocation to the concessions and charged them instead a much higher fee to pay for their access to the passenger flow. The necessary result of this scheme is not only to vastly overcharge the Airlines for their fair share of air-operations costs—because none of those costs are allocated to the concessions—but also to recover those air-operations costs *again* from the Air-

²⁶ The parking lot is treated by the Airport as a stand-alone cost center; but, like the terminal concessions, the parking lot is allocated none of the air-operations costs.

²⁷ The unreasonableness of the Airport's square-footage allocations is further demonstrated by the fact that the advertising and telephone concessions (which utilize only wall space) generate substantial revenues—derived solely from the passenger flow—but occupy no square footage at all. See Dompke Testimony at 159-61 (J.A. 74-75). The Airport thus allocates no costs to these concessions, but instead deducts a portion of the advertising revenues from the terminal costs it allocates to other users. See Pl. Ex. 6 at 6 (J.A. 203-04). The Airport, however, refuses to similarly deduct the substantial excess revenues received from the other concessions.

lines' passengers, who ultimately pay the concession fees. It is little wonder that this approach has created surpluses that "troubled" the District Court and that were criticized by a Judge on the Court of Appeals as a "slush fund."²⁸

This Court has held that "considerations of fairness, not mere mathematics, govern the allocation of costs." *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 591 (1945). In that case, two gas companies had objected that the Federal Power Commission, when allocating the costs of a pipeline between the companies' regulated and unregulated activities in order to determine a reasonable regulated rate, had not segregated sections of the pipeline but had treated it as an integrated whole. The Court held that the allocation was fair because "the beneficiaries of the entire project share equitably in the cost." *Id.* As the Court held, to allocate the regulated activities all the costs of the pipeline section servicing those activities would improperly assume that this section "was a separate project on which the [unregulated activities] were in no way dependent." *Id.*

That is, however, precisely what the Airport has done in its allocation of air-operations costs. The Airlines submit that it is plainly unfair, and unreasonable, for the Airport to employ an arbitrary allocation methodology that completely ignores the substantial benefits bestowed on the concessions by the air operations, as well as the dependence of the concessions on those operations. Since the Airlines have therefore paid substantially more than their fair share of the costs of those operations, their fees are unreasonable under the AHTA.

²⁸ Official Audio Tape of Oral Argument before the United States Court of Appeals for the Sixth Circuit, Nos. 90-1811/2117 (Sep. 23, 1991).

B. The Airport Unreasonably Imposes Fees that Are Designed to Generate Substantial Excess Revenues at the Expense of the Airlines and Their Passengers

In addition to, and independent of, the Airport's arbitrary and unfair allocation of costs among various users, the Airport's fee methodology is unreasonable because it is designed to earn, and in fact does earn, substantial surpluses for the Airport far in excess of its costs. These surpluses, which are generated at the expense of the Airlines and their passengers, flatly contravene Congress' intent that airports impose only those fees necessary to make them self-sustaining without generating "financial windfalls." Senate Report, 1973 U.S.C.C.A.N. at 1446. They also contravene *Evansville's* requirement that airport user fees do no more than "meet . . . past, as well as current, deficits." 707 U.S. at 720.²⁹

1. The Airport Unreasonably Generates Revenues Far in Excess of Its Costs

There is no dispute that the Airport's fees generate surplus revenues far in excess of all the Airport's costs of operations, maintenance, debt service, and other capital expenditures, including every conceivable future capital project. Indeed, as noted, as of the end of 1989 the Airport's accumulated cash surpluses had risen to more than \$9,000,000, which equaled more than 127% of that year's total revenues. And, as the Airlines established at trial, these surpluses will rise to at least

²⁹ User fees such as those at issue in *Evansville* and this case are subjected to a far stricter standard under the Commerce Clause than are general revenue taxes. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 (1981). Unlike general revenue taxes, which need not be related to the services provided to the taxpayer, user fees are invalid if they are "manifestly disproportionate to the services rendered" by the State to the users. *Id.* at 622 n.12 (quoting *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)). In enacting the AHTA, Congress made clear both that airport user fees were not to be used for general revenue purposes and that their validity was to be measured under an even stricter standard than this Court applied under the Commerce Clause in *Evansville*.

\$19,000,000 by the end of this decade, even accounting for every projected capital project on the Airport's "wish list," the vast majority of which had not received required approvals. *See supra* at 8.³⁰ Given these facts, it is not surprising that the Airport's witnesses could give no use for these surpluses other than as a hypothetical earthquake contingency fund. *Id.* at 9. It is also not surprising that a panel member in the Sixth Circuit would regard them as a "slush fund."

It is unreasonable for the Airport to assess fees on the Airlines and their passengers that produce such unnecessary, exorbitant profits. In enacting the AHTA, Congress sought to prohibit airports from collecting fees that "would be used to gain financial windfalls." Senate Report, 1973 U.S.C.C.A.N. at 1446. Yet that is precisely what the Airport's fees have produced in this case. As Judge Posner held in *Indianapolis*, such fees are necessarily unreasonable under the AHTA because the "result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers." 733 F.2d at 1268.³¹

Furthermore, in *Evansville* this Court held that user fees are "excessive in relation to costs incurred by the taxing authorities," and are therefore unreasonable, if they "do more than meet . . . past, as well as current, deficits." 707 U.S. at 719, 720.³² Here, the Airport's surpluses are

³⁰ As explained below, the Airlines also believe it is inappropriate to charge current users for future projects. *See infra* at 36.

³¹ *See also* Note, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319, 323-24 (1983) ("the overall purpose of [the AHTA] was to prevent revenues from airport user fees from exceeding airport operational and capital costs").

³² As the Court has subsequently explained, this standard "compar[es] total revenue with total outlays," and allows current revenues to be offset against past deficits. *Massachusetts v. United States*, 435 U.S. at 470 n.25.

not used to meet any "past" or "current" deficits, but rather accumulate for no purpose whatsoever. This is flatly at odds with Congress' intent that local airports charge only reasonable user fees which, when combined with generous federal funding derived from the 10% tax on passenger airline tickets, "will make the airport as self-sustaining as possible . . ." 49 U.S.C. App. § 2210(a)(9) (1988).³³

In creating a limited exemption in § 1513(b) for "reasonable" user fees on aircraft operators, Congress intended for those fees merely to compensate for airport costs, not fund unlimited airport profits.³⁴ Congress also sought to prevent what occurred in the aftermath of the *Evansville* decision, when local airports throughout the Nation immediately began imposing their own head taxes without limitation or regard for reasonableness, thereby multiplying the burdens on interstate commerce.³⁵

³³ The Court expressly relied on this language in upholding the fees at issue in *Evansville*. 405 U.S. at 721. (The language was originally enacted in 1970 as Section 18(8) of the AADA, and was reenacted in 1982 as Section 511(a)(9) of the AAIA). Just as this Court relied on this language in *Evansville*, so should the Court rely upon it in interpreting the AHTA. The AHTA's prohibition on local airport fees was intimately connected with federal funding requirements, and Congress intended that "the two actions must be viewed together and that neither should stand alone without the other." Senate Report, 1973 U.S.C.C.A.N. at 1455. *See also* *Island Aviation, Inc. v. Guam Airport Authority*, 562 F. Supp. 951, 959 (D. Guam 1982) (reading § 1513 and § 2210 together); Brief for the United States as Amicus Curiae 14 (filed May 18, 1993) (same); Brief of All Respondents in Opposition to Petition for Writ of Certiorari 18 (Section 2210 "must be considered in applying AHTA").

³⁴ *See, e.g.*, Hearings on H.R. 2337 *et al.* before the Subcomm. on Trans. and Aero. of the House Comm. on Interstate and Foreign Commerce [hereinafter "1972 House Hearings"], 92d Cong., 2d Sess. 99 (1972) (statement of Rep. Dingell) (AHTA was intended to permit "fair and compensatory landing charges").

³⁵ As Congress stressed, whereas only five or six jurisdictions imposed head taxes prior to *Evansville*, that number had increased

The same outcome will occur, however, if the decision of the Court of Appeals were upheld in this case. For if every airport in the country were permitted to accumulate profits on the scale that Grand Rapids has, the result would be to completely sabotage Congress' intention to limit further burdens on air travel.³⁶

2. All of the Airport's Costs and Revenues Must be Considered When Evaluating the Reasonableness of the Fees Imposed on the Airlines

The Court of Appeals held that the Airport's substantial profits are irrelevant to whether the fees imposed upon the Airlines are reasonable, because "[n]on-airline concessions are not within the scope of the AHTA." J.A. 23.

This holding misconstrued the Airlines' challenge, as well as Congress' intent in enacting the AHTA. The Airlines are not challenging the reasonableness of the concession fees under the AHTA.³⁷ Rather, the Airlines

to 44 only one year after this Court's decision. See H.R. Rep. No. 157, 93d Cong., 1st Sess. 4 (1973) (number as of April 19, 1973); Hearings on H.R. 4082 *et al.* before the Subcomm. on Trans. and Aero. of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 64 (1973) (statement of Rep. Dingell) ("the number is going up by the minute"); see also Senate Report, 1973 U.S.C.C.A.N. at 1450 (noting that 31 jurisdictions had enacted head taxes as of February 30, 1973).

³⁶ Such an outcome would be especially inappropriate in light of Congress' recent passage of PFC legislation that authorizes airports to charge what amount to "head taxes" to fund specific capital projects approved by the FAA. See *supra* at 15. Indeed, the Airport has availed itself of this authority and has applied for and received approval to impose a PFC in order to raise \$12,450,000 for planned capital improvements, some of which were relied on at trial to justify the surpluses here at issue. This makes those surpluses even less "reasonable" within the meaning of the AHTA.

³⁷ Although it is not necessary to reach the issue in this case, the AHTA's broad language plainly applies to concession fees as well as to fees on aircraft operators. Under § 1513(a), no public airport may "levy or collect a tax, fee, head charge, or other charge, directly

are challenging the reasonableness of the Airport's fee methodology as it affects *them*, and argue only that the effect of concession fees must be *considered* when deciding that question. As Judge Posner held in *Indianapolis*:

The reasonableness of the concession rentals themselves is not in issue in this case—only the reasonableness of the fees charged the airlines. The basis of the airlines' complaint about those fees, however, is that the airport is required to and has failed to take its concession rentals into account in determining what fees to impose on the airlines.

733 F.2d at 1265.

Moreover, in the AHTA Congress specifically prohibited public airport operators from imposing any fees "*directly or indirectly*" on persons traveling in air commerce or on the carriage of those persons. The history of the statute makes the intent of this language clear: "[w]hether the passenger pays the head tax, or whether it is absorbed by the airlines, *the end result is to raise the cost of air travel.*" Senate Report, 1973 U.S.C.C.A.N. at 1451 (emphasis supplied). Furthermore, in 49 U.S.C. App. § 2210(a)(1) (which must be read together with the AHTA, see *supra* note 33), Congress required that all airport facilities "be available for public use on fair and reasonable terms" As the Solicitor General has pointed out in this case, this statutory provision plainly includes concessions. See Brief for the United States as Amicus Curiae 8 (filed May 18, 1993).

In addition, and in any event, the Airlines established at trial that the Airport's concession fees are ultimately

or indirectly, on persons traveling in air commerce" 49 U.S.C. App. § 1513(a) (1988). Under this language, a concession fee is clearly an "indirect" charge on "persons traveling in air commerce." Of course, fees on concessions must be subject to an inherent reasonableness requirement, a requirement that Congress made explicit in § 1513(b) with respect to fees on aircraft operators,

paid by the Airlines' passengers—because those passengers *are* the concessions' customers. Therefore, as Judge Posner held, when the fees on concessions are considered together with the fees on the Airlines, the Airlines are necessarily adversely affected. This is because, as an economic matter:

When the airport charges a rental fee to concessionaires it is as if it were charging a landing fee to the airlines or imposing a head tax on the passengers. If a traveler is willing to pay \$140 to fly from Indianapolis to (say) New York, it should be a matter of indifference to him whether he pays \$100 for the ticket, \$10 in head tax, and \$30 for parking; or \$120 for the ticket and \$20 for parking, with no head tax. What matters to him is the total cost that he must incur to make the flight, rather than the form in which the cost is distributed among the various items he must buy.

733 F.2d at 1268.

Indeed, as noted above, Congress itself expressly embraced this same proposition, *i.e.*, that it is the *total* cost of travel that matters to the passenger and that determines the impact on air commerce.³⁸ Accordingly, any increase in that total cost—either through increased concession fees on passengers, increased Airline fees, or a combination of both—will necessarily lead to a decline in air travel and a corresponding decline in Airline revenues. Therefore, when the Airport's total fees on the Airlines and their passengers dramatically exceed the Airport's costs—as they plainly do here—“the end result is to raise the cost of air travel” (Senate Report, 1973 U.S.C.C.A.N. at 1451), an end result that necessarily harms both the Airlines and interstate travel. Conversely, requiring the

³⁸ Cf. *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2039-40 (1992) (local aviation regulation must be measured by its actual economic effects on airline ticket prices, regardless of whether that regulation directly regulates those prices).

Airport to impose only reasonable fees that do no more than meet its past and current deficits will necessarily reduce the exaction on the Airlines—the result Congress intended when it enacted the AHTA.³⁹

For all these reasons, the effect of the Airport's concession fees simply cannot be ignored when evaluating the reasonableness of its fees on the Airlines. For to do so would permit all airports to do what this one has done: impose fees that generate “financial windfalls,” that unreasonably raise the total costs of air travel, and that unfairly burden Airlines and their passengers.⁴⁰ That

³⁹ Thus, it is unnecessary to decide, as did the Court of Appeals, whether the Airlines have “standing to assert the claims of the non-airline airport users or passengers.” J.A. 22. The Airlines are here asserting their *own* rights to be free of unreasonable fees, not the rights of other users. Nevertheless, the Court of Appeals erred in holding that the Airlines had no standing to raise the rights of their passengers. See, e.g., *Craig v. Boren*, 429 U.S. 190, 194 (1976) (business has standing to raise rights of customers because of effect that violation of those rights has on revenues); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 16 (1st Cir. 1987) (Congress “viewed air carriers as a kind of surrogate for air passengers” under the AHTA because they have “a significant financial incentive, and the expertise needed, to enforce the statute”).

⁴⁰ Citing language from Judge Posner's opinion in *Indianapolis*, the courts below considered whether the Airport exercised “monopoly” power. See J.A. 24; Pet. App. 33a-34a. This consideration, however, is irrelevant under the AHTA, just as it was under this Court's analysis in *Evansville*. In the AHTA, Congress prohibited unreasonable fees at *all* airports, not merely those that possess a particular degree of monopoly power. Thus, the critical question is whether the Airport assesses fees far in excess of its costs—an entirely straightforward analysis—not whether it is a “monopoly” under some unknown definition of that term. Nor did Judge Posner reason any differently, as he referred to monopoly power merely as an explanation of the airport's ability to assess fees in excess of its costs (an ability clearly present in this case), not as a prerequisite to a finding of unreasonableness under the AHTA. See 733 F.2d at 1267 (“[i]f the Indianapolis airport did not have monopoly power it could not extract revenues vastly in excess of its costs”); *id.* at 1269 (airport's surpluses show its locational monopoly). In

is precisely what Congress sought to prohibit when it enacted the AHTA.

3. *The Airport Unreasonably Assesses Mythical "Carrying Charges" on Capital Assets that Require Airport Users to Pay Two to Three Times the Cost of Those Assets*

It is also patently unreasonable under the AHTA to require airport users to pay the airport two to three times the cost of its capital assets, with the excess being added to the airport's cash surplus. Yet that is what the Airport has done here, through the imposition of mythical "carrying charges" on locally-funded capital assets.

The Airport assesses such charges on the locally-funded portion of all capital assets,⁴¹ whether purchased from bond revenues or from previous surpluses. See Ross Deposition at 88 (J.A. 50-51). It does so by assuming—contrary to fact—that all locally-funded assets were purchased with non-existent 25-30 year mortgages and by charging a hypothetical 8% "interest" rate on those assets plus a ½% "periodic maintenance" charge. See Pl. Ex. 6, Exs. 5 & 7 thereto (J.A. 212-13, 216-19); Dompke Testimony at 141-47 (J.A. 67-70).

Thus, whereas charging only for depreciation plus debt service interest would recover no more than the actual cost of the assets over their useful lives, the Airport's carrying charges result in the Airlines and other users paying approximately twice the cost of those assets, and

any event, as noted, the record in this case demonstrates that in fact the Airport at Grand Rapids *does* have monopoly power. See Horngren Testimony at 551, 557 (J.A. 104).

⁴¹ Under federal law, it is improper for the Airport to include the federal share of any project financed by federal funds in the rate base from which it calculates its user fees. See 49 U.S.C. App. § 2210(a) (9) (1988). The Airport also deducts the share of projects financed by State grant money.

three times when one considers that the Airport users in fact funded the surpluses from which many of the assets were originally purchased.⁴² For example, a recent addition to the terminal building cost the Airport \$3,174,000, but Airport users are being allocated carrying charges of \$311,640 per year for nearly thirty years, which will result in a total airport "recovery" of approximately \$9,000,000.⁴³

Such charges are inherently unreasonable and necessarily overstate fees properly assessable on the Airlines. Under the AHTA, the Airport may charge reasonable user fees designed to recover its costs, but it may not charge fees that recover two to three times those costs, thereby generating prohibited financial windfalls. The Airport has defended its carrying charges as being similar to "interest charged by a financing institution."⁴⁴ Congress, however, did not intend for public airports to become "financing institutions" that earn a profit on funds expended on their own facilities.

⁴² The maintenance charge allows double recovery for the Airport as well, as users are also allocated the current maintenance costs of all Airport facilities. See Pl. Ex. 6, Ex. 3 thereto (J.A. 209).

⁴³ See Pl. Ex. 6, Ex. 7 thereto, at 2, line F, col. 5 (original cost); *id.* at col. 13 (annual carrying charge); *id.* at col. 6 (useful life) (J.A. 216-17); Horngren Testimony at 476-79 (J.A. 92-94).

⁴⁴ Appellee Airport's Brief 15. See also J.A. 29 (Court of Appeals' finding); Brown Testimony at 887-88 (carrying charge is "[d]epreciation with an interest cost" that is intended to "equal . . . what [the Airport] might have earned on the money had [it] invested it in some other particular area") (J.A. 140); Ross Deposition at 240 (carrying charge is justified because "the county could keep those funds and get [an] interest return on them if we didn't use it for further development of the airfield") (J.A. 55); Deposition Testimony of Sandra Doncal ("Doncal Deposition") at 105-06 (carrying charge equal to what Airport could have earned if it had not invested in airport facilities but had put the money in a bank instead) (J.A. 56) (Ms. Doncal was the Director of Finance for the Kent County Aeronautics Board from 1984-89).

The Airport has also defended these charges as a mechanism by which the Airport is able to "accumulate funds rather than borrow to finance needs." Appellee Brief of the County of Kent, Michigan 27-28. This *post hoc* rationalization⁴⁵ likewise cannot be squared with the AHTA. The AHTA permits the Airport to assess only reasonable fees on aircraft operators "for the use of airport facilities." 49 U.S.C. App. § 1513(b) (1988) (emphasis supplied). Under this language, an airport may not "accumulate funds" by charging current users for speculative future capital costs that have not been incurred and that may never be incurred. Such fees "are unreasonable as a matter of law because they do not relate to the present use of the existing public facility." *City and County of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834, 840 (D. Colo. 1989).⁴⁶

⁴⁵ The Airport's carrying charges bear no relation whatsoever to any planned capital expenses. If the Airport wished to accumulate funds for the replacement of capital assets upon the expiration of their useful lives, it would charge for depreciation plus an amount designed to approximate the effect of inflation. The Airport's carrying charges, however, approximate market interest rates (see Doncal Deposition at 105-06 (J.A. 56)), which are unrelated to (and necessarily higher than) inflation rates. Moreover, the Airport has made no showing regarding which of its assets it intends to replace.

⁴⁶ In *Denver*, the Court held that an airport may not charge current users for the costs of a future new airport, explaining that "since the airlines are unable to use airport facilities which do not yet exist, [the airport] cannot charge them and their passengers for any costs connected with a replacement facility before that facility is in use." *Id.* at 840. The Court held that the airport's charges "are the sort of 'financial windfalls' contemplated by Congress since there is no assurance that the proposed new airport will be built or that the defendant airlines will ever actually use the new airport." *Id.*

Similarly, in *Raleigh-Durham Airport Authority v. Delta Air Lines, Inc.*, 429 F. Supp. 1069 (D.N.C. 1976), the Court struck down charges for depreciation, interest, bond debt, and periodic maintenance on airport improvements not then in use. As the Court held,

C. The Airport Unreasonably Discriminates Against the Airlines in Favor of Local Aviation

Finally, the Airport's fees violate the third *Evansville* standard: they discriminate against the Airlines in favor of local general aviation. As noted, the Airlines are charged 100% of their allocated costs as determined by the Airport, but locally-based general aviation is charged less than 20% of its allocated costs. As was held in *Indianapolis*, "[t]his is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act." 733 F.2d at 1271. This was also the conclusion of Judge Kennedy, who dissented from the panel's decision below. *See J.A. 27.*

Congress enacted the AHTA in part because it believed the *Evansville* decision "[did] not provide adequate safeguards to prevent . . . discriminatory taxation." Senate Report, 1973 U.S.C.C.A.N. at 1446. In particular, Congress was concerned that head taxes, which typically exempted general aviation, unduly discriminated against commercial airline passengers in favor of owners of private aircraft.⁴⁷ The Airport's discriminatory fee structure, which is not justified by any differences in the use of Airport facilities by the Airlines and general aviation,

"[t]he concept of . . . prepaying or prefunding such improvements by increased landing fees prior to their construction . . . has no proper place in calculation of landing fees" *Id.* at 1081.

⁴⁷ *See, e.g.*, 1972 House Hearings at 99 (statement of Rep. Dingell) (shift from compensatory landing fees to head taxes would improperly "shift the burden from general aviation to the airline user"); *id.* at 114 (statement of Rep. Dingell) (with head taxes, "the fellow using the airline will pay more than the fellow flying in his private jet"); Hearings on S. 2397 *et al.* before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong., 2d Sess. 188 (1972) (statement of Sen. Cannon) ("I am sure you can see the inequity if you are going to put [the tax] on passengers who travel simply on scheduled air carriers as distinguished from general aviation users who have separate airport facilities").

is precisely the type of discriminatory burden on commercial air passengers that Congress sought to prohibit.

The Court of Appeals nevertheless held that this fee structure "does not result in discriminatory treatment against the Airlines, because the shortfall from General Aviation is not paid for by the Airlines but is made up out of the surplus concession revenues." J.A. 34 (opinion of Contie & Nelson, JJ.). This holding is erroneous both as a matter of fact and as a matter of law.

First, it is simply not true that the discriminatory treatment has no effect on the Airlines. As Judge Kennedy noted in dissent below, the concession revenues that are currently subsidizing the discriminatory fees on general aviation "could be used to purchase improvements or additional equipment that would potentially benefit both the concessions and the Airlines." J.A. 27. Thus, because these funds are used instead to subsidize general aviation, the Airlines are directly harmed. And because the concession fees are in fact funded by the airline passengers, the subsidy is ultimately felt by the Airlines in decreased ticket revenues. Finally, to the extent that general aviation and the Airlines are alternative, competing modes of travel, the systematic discrimination against the Airlines necessarily puts them at a competitive disadvantage. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

Even more importantly, under this Court's Commerce Clause precedents (which, as explained above, must be considered a minimum standard under the AHTA), there is no justification for the Airport's blatant discrimination in favor of local interests.⁴⁸ As this Court has repeatedly

⁴⁸ For purposes of the AHTA (in contrast with the Commerce Clause) it is irrelevant that general aviation is locally-based as compared to the national Airlines, because Congress intended to forbid undue discrimination among *all* airport users, and, specifically, discrimination in favor of general aviation.

held, such facially discriminatory legislation "is typically struck down without further inquiry" and "at a minimum . . . invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." ⁴⁹ The AHTA demands at least this scrutiny, if not more.

The Airport has offered no reason, much less a legitimate one, for its discriminatory treatment of general aviation, arguing instead that the discrimination is lawful because the Airport is merely subsidizing general aviation rather than taxing the Airlines. This Court, however, has already rejected that argument. In *Bacchus Imports, supra*, the Court rejected a State's claim that discriminatory tax exemptions for local products were appropriate because the exemptions merely sought to promote local industry rather than discriminate against foreign products. 468 U.S. at 273. As the Court held:

If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory. Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses on the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other.

Id.

⁴⁹ *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014 (1992) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)). Accord, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019, 2023-24 (1992); *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800-02 (1992).

For all these reasons—the fees' unfair allocation of costs to the Airlines, their exaction of revenues from the Airlines and their passengers far in excess of the Airport's costs, and their deliberate discriminatory treatment of the Airlines—the fees are unreasonable under the AHTA and should be disapproved by this Court.

II. THE AIRPORT'S FEES VIOLATE THE COMMERCE CLAUSE

The Commerce Clause provides that “[t]he Congress shall have Power . . . to regulate Commerce . . . among the several States,” and has long been understood to embody a negative prohibition against State action that unreasonably burdens interstate commerce. However, notwithstanding that this Court decided an airline Commerce Claim challenge in *Evansville*, the Court of Appeals refused even to *consider* such a claim here, holding that the Commerce Clause remains operative only if “Congress ha[s] taken no other action to regulate the area.” J.A. 31 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)). According to the Court of Appeals, because Congress has acted to regulate airport fees through the AHTA, courts may no longer review such fees under the Commerce Clause.

This holding is erroneous. As this Court has held, courts must undertake such review unless “Congress’ ‘intent and policy’ to sustain state legislation from attack under the Commerce Clause” was “*expressly stated*” in the legislation at issue. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982)) (emphasis supplied). Furthermore, in that express statement Congress must “*affirmatively contemplate otherwise invalid state legislation*” and its “*intent must be unmistakably clear*.” *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984) (emphasis supplied). *Accord, Wyoming v. Oklahoma*, 112 S. Ct.

789, 802 (1992) (“Congress must manifest its unambiguous intent”); *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (“An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation . . .”).⁵⁰

As this Court has explained, the requirement that Congress must “expressly state” its “unmistakably clear” intent to preclude Commerce Clause review is necessary “because of the important role the Commerce Clause plays in protecting the free flow of interstate trade” *Id.* at 138-39. And, in practice, Congress has regulated almost *every* area of interstate commerce in some way, but only rarely does it expressly state its intention to approve actions that would otherwise contravene the Commerce Clause. Thus, in each of the cited cases, the Court reviewed State action under the Commerce Clause notwithstanding that Congress had taken some “action” to regulate the “area,” because Congress had not expressly manifested its unmistakable, unambiguous intent to preclude such review.

Congress expressed no such intent in the AHTA. Quite to the contrary, far from acting to expressly *approve* local airport charges that would otherwise contravene the Constitution, Congress sought to overrule *Evansville* in part and establish a *stricter* standard than this Court had applied under the Commerce Clause. Thus, to the extent that Congress decided not to subject certain State action to the AHTA’s stricter standards, that action must be subjected to review under the Commerce Clause. Indeed, the language of § 1513(b) expresses Congress’ intent to exempt only a specific and a

⁵⁰ Nothing in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which was cited by the Court of Appeals, provides otherwise. That case merely recognized that “[w]hen Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce” *Id.* at 154. However, nothing in this statement alters the principle that if Congress means to “strike the balance” by precluding Commerce Clause review, it must say so expressly and unmistakably.

limited number of State actions from the AHTA's prohibition, but makes clear that the AHTA was intended to have no effect on the legality of any exempted actions.⁵¹ As a result, in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 7-12 (1986), this Court reviewed an aviation tax under the Commerce Clause notwithstanding the Court's express holding that the tax was not within the scope of the AHTA. The Court of Appeals' refusal to evaluate the Airport's fees under the Commerce Clause was therefore a critical error, and one that—if upheld—would have severe ramifications far beyond the context of the AHTA.

If this Court agrees with the Airlines that the Airport's fees are unreasonable under the AHTA, the Court need not reach the Commerce Clause issue. But if the Court agrees with the Court of Appeals that the Airlines' AHTA challenge (or any portion of it) fails because the effect of concession fees may not be considered under that statute, it becomes imperative to review the Airport's fees under the Commerce Clause.⁵² That is because even if Congress intended to completely exclude the effect of concession fees from consideration under the AHTA, such fees clearly affect interstate commerce and therefore must be considered under the Commerce Clause.⁵³

⁵¹ As this Court has consistently held, saving clauses like § 1513(b) merely limit the scope of federal preemption and do not thereby evince an intent to approve otherwise invalid legislation. See *Wyoming*, 112 S. Ct. at 802 (preemption saving clauses merely preserve constitutionally valid state laws); *New England Power*, 455 U.S. at 341 (same). See also *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 12 n.6 (1983) (intent of § 1513(b) is to limit preemptive scope of AHTA).

⁵² As explained above, the Airport's fees are unreasonable under the AHTA irrespective of the effect of the concession fees. In particular, the Airport's concession fees have nothing to do with its initial misallocation of costs, its unreasonable carrying charges, or its discrimination in favor of general aviation.

⁵³ See, e.g., *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980) (Commerce Clause embraces all activities

When the Airport's fee methodology is measured against the three *Evansville* Commerce Clause standards, it fails to pass constitutional muster for precisely the reasons explained above with respect to the AHTA: it unfairly and arbitrarily allocates all the air-operations costs to aircraft operators and none to concessions; it generates substantial surpluses (including surpluses generated from concession fees imposed on passengers) far in excess of the Airport's costs; and it discriminates against the interstate airlines in favor of locally-based general aviation.⁵⁴ Thus, even if the Airport's fees are in part outside the scope of the AHTA, taken together they unquestionably constitute an unreasonable burden on interstate commerce and are therefore invalid under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded for consideration of petitioners' damages.

Respectfully submitted,

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having any effect on interstate commerce); *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992) (airport concession fees subjected to Commerce Clause review); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516 (11th Cir. 1990), cert. denied, 498 U.S. 1120 (1991) (same).

⁵⁴ As Judge Posner reasoned in *Indianapolis*, "since flights by private planes are more likely to be intrastate than airline flights are, the effect of leaving [the discrimination in favor of general aviation] unchanged has been to shift some of the costs imposed by local users of the airport to its interstate users, who are, along with many of their customers, non-residents of [Michigan]." 733 F.2d at 1271.

SEP 22 1993

In The
Supreme Court of the United States
October Term, 1993

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES,
INC., COMAIR, INC., MIDWAY AIRLINES (1987),
INC., USAIR, INC., AMERICAN AIRLINES, INC.,
and UNITED AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY
BOARD OF AERONAUTICS, and THE KENT COUNTY
DEPARTMENT OF AERONAUTICS,

Respondents.

On Writ Of Certiorari
To the United States Court Of Appeals
For The Sixth Circuit

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QUESTIONS PRESENTED

- I. Whether the Anti-Head Tax Act regulates what airport owners charge airlines for their use of airfield and terminal facilities?
- II. Whether the Anti-Head Tax Act provides the airlines with an implied right of action for direct judicial review of airport fees and charges even though Congress has provided in other federal aviation statutes that the Secretary of Transportation is to ensure that such airport charges are reasonable and nondiscriminatory?
- III. Whether the Commerce Clause provides a basis for direct judicial review of airport charges when Congress has, by statute, set standards for such charges and established an administrative enforcement system?
- IV. Whether the Anti-Head Tax Act or the Commerce Clause require airports to charge airlines less than the actual costs of providing the airfield and terminal facilities the airlines use, whenever an airport is able to collect surplus revenues from its concessionaires?

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STATEMENT OF THE CASE

I. FACTS

The Kent County International Airport in Grand Rapids, Michigan is owned by Kent County, Michigan (Kent County) and managed by the Kent County Board of Aeronautics and the Kent County Department of Aeronautics (Airport). Under Michigan law, Kent County is responsible for the maintenance, operation, and improvement of the Airport. Mich. Comp. Laws § 259.133 (1979) (Mich. Stat. Ann. § 10.233 (Callaghan 1991)).

The fundamental purpose of the Airport is to serve the air transportation needs of the regional community. In response to the local demand for airline services from the southwestern Michigan population and business base, Kent County built the Airport in 1963. Stipulation as to Airport History, Docket Item No. 139, ¶ 19, R. 784-85; J.A. 158-61, 184-86 and 192.

Historically, the funds for the construction, maintenance, operation, and improvement of Airport facilities have been derived from four sources: (1) local funds; (2) grants from the state or federal governments; (3) Airport charges to its aeronautical users, including the petitioner airlines (Airlines); and (4) Airport charges to non-aeronautical concession operators and to the public who use the nonaeronautical facilities. Stipulation as to Airport History, Docket Item No. 139, ¶¶ 12-19, R. 784-85; Pl. Ex. 6, J.A. 210 and 212-18.¹

¹ With reference to Rule 24.5 as to rulings on Exhibits, all Exhibits referred to in this Brief were admitted into evidence by a January 30, 1990 Stipulation (Docket Item 130), unless

The acquisition of land and construction of the Airport was financed by Kent County with financial assistance from federal and state funds. Kent County has spent over \$5,500,000.00, and the state of Michigan more than \$3,000,000.00, for construction and improvement of the Airport. J.A. 130; Pl. Ex. 6, J.A. 210 and 212-18. In addition, Kent County has allocated over \$14,000,000.00 of available funds for improvements to roads that service the Airport. J.A. 128; Ex. DA-29, R. 796, 810.

As of the time of trial, the federal government had provided grants of more than \$20,000,000.00 to the Airport. J.A. 210, 212, 213, 216-19 ("federal aid" column). In exchange for these federal grants, the Airport has given assurances, satisfactory to the Secretary of Transportation, that the Airport will be available "for public use on fair and reasonable terms and without unjust discrimination," that the Airport "will maintain a fee and rental structure . . . for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection," and that "all revenues generated by the airport . . . will be expended by it for the capital or operating costs of the airport [and] the local airport system." Ex. DA-35B at J.A. 302, 303 and 305, R. 644.

In addition to these contributions from the county, state and federal governments, the Airport itself has

otherwise indicated. Reference to the District Court opinions in this case are to the pages of the Appendix attached to the Airlines' Petition for Certiorari.

spent millions of dollars on construction, maintenance, improvement and operation costs. See, Pl. Ex. 6, J.A. 193 *et seq.* and Pl. Ex. 20, J.A. 223, *et seq.* The Airport, as owner and landlord, recovers these costs from Airport users. Generally, airports use either a "compensatory" ("cost of service") or a "residual cost" methodology to determine the nature and amount of charges to aircraft operators that use airport facilities. Pet. App. 27a. The Airport in Kent County has always used a compensatory method, basing its charges to the Airlines on the Airport's actual "break-even" costs of providing specific aeronautical facilities for the Airlines' use. Pet. App. 27a.² Under the compensatory methodology the Airlines' only obligation is to pay for their own use of Airport facilities; they have no obligation to assume any part of any Airport deficit. Under the contrasting residual cost methodology, airlines specifically agree to cover any airport deficit (or residual costs) that may remain after an airport has collected its nonaeronautical revenues. Such "residual costs" can be more or less than the allocated costs of the aeronautical facilities used by the airlines. Pet. App. 27a.

For Airport rate-setting purposes, after netting out all funds received from the federal and state governments, the Airport allocates its total incurred costs among three primary, functional "cost centers": (1) an airfield with three runways, taxiways, and aprons for commercial

² The compensatory "break-even" approach was designed by Airport consultant James Buckley, and is specifically described at J.A. 251-53. The general rate-making principles are succinctly set forth at J.A. 239-53 as part of the 1969 Airport rate study. J.A. 227-53. The full text of the disputed rate study is at J.A. 193-222.

aircraft parking; (2) a passenger terminal building used by the Airlines, by the visiting public, by passengers, by various concession operators, by other federal government agencies, and by the Airport staff; and (3) a public parking lot. Pet. App. 25-28a; J.A. 193-222. There are also additional secondary cost centers. The Airlines are charged only for their share of the actual costs of the airfield and terminal facilities they use at this Airport. Pet. App. 28a, 37a.

The Airport charges the Airlines a landing fee for their use of the airfield. The landing fee is determined by allocating to the Airlines their proportional share of the net local costs of the airfield, based upon the weight of their aircraft and the number of their operations at the Airport. The resulting landing fee (expressed as a rate of 70¢ per thousand pounds of aircraft weight) is then charged for each commercial aircraft landing. J.A. 193-222.³

The Airport charges the Airlines rent for their use of the passenger terminal. The net local costs of the Airport terminal are allocated to three types of space: prime space, non-prime air-conditioned space, and non-prime space without air conditioning. Pet. App. 28a. These net costs are then divided by the total amount of rentable space (by category) to yield annual terminal rental charges (expressed as a rate per square foot that ranged between \$12 and \$25). *Id.* The rent for each of the Airlines is then determined by the square footage of each type of

³ The unscheduled general aviation flights do not pay a landing fee. Instead, there is a 4¢ per gallon "fuel flowage" fee charged on fuel sold to general aviation users. Pet. App. 27-29a.

space that each Airline chooses to occupy and use, plus a proportional allocation of the public space in the terminal. *Id.*

The Airport's concession operators (restaurant, gift shop, car rental agencies) do not use the airfield, and their operations do not affect the costs of building, maintaining, operating or improving the airfield. Therefore, the concessionaires are not charged any of the airfield costs. The concession operators do, however, share the passenger terminal with the Airlines, and they are allocated their share of the terminal space, plus a proportional share of terminal public space. J.A. 25-26.

The Airport does not use a compensatory method to determine its rates and charges for concession operators. Rather, the Airport bases its charges on the revenues of Airport concessions, which reflect local market conditions and consumer preferences. As a result, the Airport is able to generate revenues from concessions that exceed the costs allocated to them. As of December 31, 1989, the Airport had retained earnings or a surplus of \$9,000,000.00 from Airport concessions. Pet App. 30a.

The Airport has assured the Secretary of Transportation, however, that all Airport revenues will be devoted to the maintenance and improvement of the Airport. Ex. DA-35B, J.A. 305-06. In 1990 the Airport projected that during the next decade it would spend as much as \$40,000,000.00 on specific capital improvements qualifying for partial federal aid, including a major crosswind runway for commercial airline traffic. J.A. 108-10; Ex. DA-35A, R. 634, 636. Numerous additional capital projects not qualifying for partial federal aid are projected to

cost at least \$11,000,000.00. Ex. DA-23, R. 774, J.A. 280-85; J.A. 118-26.

II. PROCEEDINGS BELOW

A. District Court Decisions

The Airlines claimed below that various Airport charges violated the Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513, the Airport and Airway Improvement Act (AAIA), 49 U.S.C. App. § 2210, the Commerce Clause and state law. The essence of the Airlines' claims was that the Airport's landing fee and terminal rental charges were excessive because they did not reflect concession revenues and that the landing fee was discriminatory because it was not collected from general aviation users.

The District Court rendered three opinions on the merits of the Airlines' claims. In denying the Airlines' summary judgment motion, the first District Court opinion held that the Airport's compensatory rate-making approach was not illegal *per se* as urged by the Airlines. Pet. App. 47a, *et seq.* After the decision in *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989), the Airport renewed its own summary judgment motion and also filed a motion to dismiss arguing, *inter alia*, that the Airlines had not exhausted their administrative remedies under the AAIA, that the Federal Aviation Administration (FAA) had primary jurisdiction, that there was no private cause of action under the AAIA, that the Airlines had not stated a cause of action under the AHTA, and that Commerce Clause review was inappropriate in light of the federal statutory scheme. Docket Items 98, 109, 120 and 121. The second opinion of

the District Court held that the Airlines had no private cause of action under the AAIA and that there was no need for Commerce Clause review, but also held that the Airlines had a private cause of action under the AHTA. Pet. App. 41a, *et seq.* After these two decisions the case proceeded to a two week non-jury trial in February of 1990.

On June 18, 1990, the District Court rendered its third and final opinion which, based on detailed findings of fact, held that the landing fees and terminal rental rates of the Airport were "reasonable" within the meaning of the AHTA. Initially, the Court noted that

generally airports formulate rates and fees for airline tenants using either a compensatory or residual cost methodology. Compensatory methods base rates and fees on the actual cost of providing the particular facility and services used. Residual cost methods base the rates and fees on the total cost of operation of the airport. Pet. App. 27a.

Specifically, with regard to the Airport the Court found

that since 1968 the KCAB [Airport] has used a compensatory methodology known as the Buckley Methodology. As used by the KCAB, the Buckley method attempts to assess user fees and rental rates only for plaintiffs' use of the facilities, services, and certain other allocable operating costs (overhead, maintenance and administration). Pet. App. 27a (footnote omitted).

After analyzing the charges imposed on the Airlines the Court concluded that "the Buckley Method is simply

a tool used to determine the break-even costs for the airlines' use of the Airport." Pet. App. 28a.

Turning from the facts to a legal analysis, the District Court initially held that "plaintiffs have the burden of proving that the rates and fees are unreasonable in light of the benefits conferred on plaintiffs." Pet. App. 30a. After reviewing the language of the AHTA the Court concluded that:

Facially, nonairline concession revenues are not within the scope of the AHTA. Accordingly, the AHTA does not support the plaintiffs insofar as they seek to require the Airport to cross credit nonairline concession revenues to plaintiffs for purposes of establishing their rates and fees. Pet. App. 32a.

The Court further held that:

The legislative history of the ADAA, of which the AHTA is a part, acknowledged that airports retained and used nonairline concession revenues that exceeded expenses. Congress contemplated that profitable airports would use such funds for local airport expansion and other capital projects. Pet App. 32a.

In addition to disagreeing with the holding in *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984), the District Court also distinguished *Indianapolis* on the ground that the Indianapolis airport had a monopoly on air travel in that region, whereas in the instant case, based on the proximity to the Lansing and Kalamazoo Airports, "the airport in Grand Rapids is not in a monopoly situation." Pet. App. 33-34a. The Court in *Indianapolis* had also based its decision on the fact that

it found that "the people who used the concessions at the Indianapolis airport are, with rare exceptions, airline passengers." 733 F.2d at 1267. The District Court here, as did the District Court in *City and County of Denver v. Continental Airlines*, 712 F. Supp. 834, 838-39 (D. Colo. 1989), found that concession users "include persons who are not air passengers" and that, in sharp contrast to the airside facilities whose use is mandatory by all air passengers, no air passenger is required to use Airport concessions. Pet. App. 35-36a.

Based on the evidence, the District Court held that "the plaintiffs were charged the break-even costs for the areas they use." The Court further found "that the Airport is charging plaintiffs only for their share of the operating expenses and is not generating any of its surplus revenues from rates and fees charged plaintiffs." Consequently, the Court held that "the Airport's charges to plaintiffs are reasonable in light of the benefits conferred on plaintiffs in exchange for the landing fees and terminal rental rates."⁴ Pet. App. 37a.

The Court also rejected the Airlines' argument that they were being discriminated against since general aviation was not charged the full allocated costs of the airfield. The Court held that the Airlines paid no part of the shortfall, but rather the

⁴ The Court did find that a portion of the overnight parking fee charged to the Airlines was unreasonable since the evidence established that the charge exceeded the costs allocated to overnight aircraft parking. The Airport did not appeal this finding. Thus, the decision of the District Court is final as to this issue.

shortfall from general aviation users is covered by charges to concessionaires and other non-airline users of the Airport. Therefore, plaintiffs' argument must fail. Pet. App. 38a.

Finally, the District Court commented on the Airport surplus in the following manner:

In conclusion, the Court holds that the AHTA does not require defendants to cross credit non-airline revenues when establishing rates to be charged airlines. Although the Court is troubled by such large surpluses generated by the Airport, it must acknowledge the prudent management which allows the Airport to run efficiently and with foresight thereby avoiding the necessity of seeking extra tax or bond revenues from the citizens of Kent County for expansion or improvement. Pet. App. 39a.

B. Sixth Circuit Court of Appeals Opinion

The Airlines appealed to the Court of Appeals for the Sixth Circuit which, on February 3, 1992, affirmed in all respects the District Court's decision except for the allocation of 100% of the crash/fire/rescue (CFR) costs to the Airlines.⁵ More specifically, the Court of Appeals held:

We AFFIRM the District Court's dismissal of the Airlines' claims under the Airport and Airway Improvement Act of 1982 and the Commerce Clause, its finding that the Airlines have no

⁵ The Sixth Circuit Court of Appeals Opinion is reprinted at J.A. 15-36. The Airport did not file a Cross Petition for Certiorari. Therefore, the CFR issue is not before this Court.

right to be cross-credited for concession revenues, the finding that the allocation of terminal rental fees between the Airlines and concessions were reasonable, and the finding that the method the airport used to assess airside operation fees for general aviation and the Airlines was reasonable. J.A. 16.

The Court noted that

[t]he accounting methodology used by the Airport views the Airport as the landlord, and all users as tenants. This accounting system, developed by James C. Buckley, is known as the Buckley or compensatory "methodology" and is widely used by airports. The system is designed so that the Airlines are only charged for the land costs, physical facilities and other expenses which can be directly allocated to them. J.A. 17 (footnote omitted).

The Court of Appeals specifically agreed with the District Court holding that the Airlines do not have a private right of action under the AAIA but have a private right of action under the AHTA. The Court further found, however, that "the Airlines have no standing to assert the claims of the non-airline airport users or passengers." J.A. 22.

Turning to the AHTA, the Court of Appeals noted that although the statute requires airport charges to airlines to be reasonable, "[t]he statute does not provide guidance for determining what constitutes a reasonable fee." J.A. 22. The Court of Appeals further found that the Airlines had "the burden of proving that the rates are unreasonable" and that deference should be given to

airports "as long as they act within a broad range of reasonableness." J.A. 22-23.

The Court succinctly rejected the Airlines' claim to the benefit of concession fees, holding that "[n]on-airline concessions are not within the scope of the AHTA." J.A. 23. The Court also distinguished *Indianapolis* on the grounds that the Airport, unlike Indianapolis, does not have a monopoly on air service in its area. The Court of Appeals, like the District Court, also found persuasive the reasoning by the court in *Denver* that concession users "include persons who are not air passengers [and that no passenger using the airport] is required to park in the parking lot, rent a car, eat at a restaurant, or buy a magazine." J.A. 24 (quoting *Denver*, 712 F. Supp. at 838-39).

The Court of Appeals therefore found the landing fee to be reasonable (except for a portion of the CFR charge) and further determined that the allocation of the costs of the passenger terminal building to the airlines and to concessions based on floor space occupancy and a proportional amount of the public space was reasonable. J.A. 25-26.

The Court of Appeals, by a 2-1 vote, also rejected the Airlines' arguments about general aviation, holding that:

Since the shortfall in the costs incurred by General Aviation does not come out of the Airlines' pocket, but is made up instead out of concession revenues, this court has no authority to order that General Aviation must be charged 100% of its airside operation costs. J.A. 32.

The Court of Appeals pointed out that

even if General Aviation were charged 100% of its airside operation costs, the Airport reasonably could continue to charge the Airlines 100% of the airside operation costs. J.A. 33.

The Court of Appeals also found that since

the airlines are not entitled to a cross-credit of concession revenues . . . the airlines do not have standing to challenge what is done . . . in regard to General Aviation. J.A. 34.

Finally, the Court of Appeals held that the District Court correctly relied on this Court's decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), when dismissing the Airlines' Commerce Clause claims, since under the AAIA "Congress has established clear guidelines for the fees and rates which may be charged commercial airlines and other public airport users[.]" noting that where Congress has regulated fees, the only issue is "the consistency between the fees and Congressional policy." J.A. 31.

SUMMARY OF ARGUMENT

By its express terms, the Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513, does not regulate or proscribe the Airport's landing fees and terminal rental charges which the Airlines challenge. Rather, § 1513(a) delineates narrow categories of forbidden fees and charges affixed on airline travelers on a direct or indirect *per capita* basis. Lest the prohibition be more broadly read, Congress in § 1513(b) explicitly decreed that the AHTA does not

prohibit the Airport from levying and collecting "reasonable rental charges, landing fees and other service charges from aircraft operators for the use of airport facilities." The lower courts' decisions that the AHTA provided a legal basis to challenge the compensatory fees charged by the Airport for landing aircraft and for rental of terminal space are inconsistent with the express terms of the statute.

Furthermore, even if the AHTA provided a substantive standard for review of the Airport's charges for the Airlines' use of airport facilities, no private right of action may be implied for direct judicial review. Under this Court's traditional test, no Congressional intent can be gleaned to permit the Airlines to sue to challenge airport fees and charges under the AHTA. To the contrary, direct judicial review undermines the intricate administrative and regulatory system under which the Secretary of Transportation has been entrusted to apply agency expertise to the determination of whether airport fees and charges are reasonable and nondiscriminatory. To allow litigants to bypass the agency review of complaints about airport fees not only ignores the series of federal statutes – beginning with the Federal Airport Act of 1946 (May 13, 1946, ch. 251, § 11, 60 Stat. 176 (1946)) and continuing through the Airport and Airway Improvement Act of 1982 (Pub. L. No. 97-248, 96 Stat. 686 (1982)) – which order the Secretary to ensure that airports make their facilities available on reasonable terms in a non-discriminatory fashion, but also runs the serious risk of inconsistent determinations by the administrative agency and the courts regarding the reasonableness of airport fees.

This pervasive Congressional action, in balancing the economic needs of local airport proprietors with the importance of encouraging interstate travel of goods and passengers, precludes judicial review under a dormant Commerce Clause analysis. U.S. Const. art. I, § 8, cl. 3. Congress having made the political judgments regarding this balance, the courts must be reluctant to upset the federal framework under the banner of a constitutional claim that an airport cannot recoup its costs of providing facilities for air carriers operating in interstate commerce.

In essence the Airlines ask the Court to outlaw compensatory rate-making, in which the Airlines are charged on a cost basis for the facilities they use, and instead to mandate residual cost rate-making in which the Airlines share in concession revenues as if they were investors in the Airport. But the Airlines contributed neither capital nor management to the Airport. Nonetheless, the Airlines urge that the courts adopt the role of a rate-making commission to compensate the Airlines for the benefits they allegedly confer on the Airport. Aside from the economic mischief and total lack of standards inherent in such a request, the Airlines' plea must be denied on the principled basis that fees derived on a compensatory cost-based system violate no federal statute or constitutional provision.

Even were the Court to review the Airlines' claims on the merits here, it should respect the detailed fact finding of the District Court which, following a full trial, reviewed the evidence and found that the compensatory system is proper and that the Airlines were charged only the "break-even" costs of the facilities which the Airlines use. This determination, reviewable only under the

"clearly erroneous" standard, should not be set aside. Since the Airport's compensatory fees and charges are reasonable, the Airlines' challenge, whether reviewed under the AHTA or the Commerce Clause, fails since both the statute and the Constitution permit reasonable, nondiscriminatory, cost-based charges to be assessed on the users of a local government's airport facilities.

ARGUMENT

I. THE ANTI-HEAD TAX ACT DOES NOT REGULATE THE AIRPORT FEES AND CHARGES CHALLENGED BY THE AIRLINES

The Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513,⁶ provides in subsection (a) that

no State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. . . .

Subsection (a) is the *only* prohibitory provision of the AHTA. To confirm the limited scope of the AHTA's prohibitions, subsection (b) provides that:

. . . nothing in this section shall prohibit a State (or political subdivision thereof. . . .) from the

⁶ The AHTA was enacted in 1973. Pub. L. No. 93-44, 87 Stat. 90 (1973).

levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or service; and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting *reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities* (emphasis added).

Thus, § 1513(a) sets forth the types of taxes and charges which states and their subdivisions are prohibited from imposing on air commerce, while § 1513(b) sets forth the types of taxes and charges which they are *not* prohibited from imposing. In *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 n.6 (1983), this Court, in a unanimous opinion striking down a state gross income tax on airlines under § 1513(a), noted that § 1513(b) "clarifies Congress' view that the States are still free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a). . . .'"⁷

Given the plain terms of the AHTA, when a charge upon air commerce is challenged under this statute, the threshold inquiry is whether the particular charge is prohibited by § 1513(a). If the charge is not prohibited by subsection (a), the inquiry must end and the challenge must be rejected.

Section 1513(a) only prohibits specified forms of state taxation of air commerce. The Airport's landing fees and

⁷ As the Airlines acknowledge, "certain fees [were] specifically exempted from statutory regulation" under the AHTA. Airlines' Brief, p. 13.

terminal rental charges now before the Court are neither taxes levied directly or indirectly upon persons (or the carriage of persons) in air commerce, nor taxes upon the sale of (or receipts from) air commerce of the sort prohibited by § 1513(a). Subsection (a) thus does not purport to prohibit the challenged charges the Airport levies upon the Airlines for their use of airport facilities. Consequently, the Airlines' statutory challenge must fail.

This Court has never before considered whether the AHTA regulates landing fees or terminal charges. The Secretary of Transportation, who is ultimately responsible for the administration and enforcement of the federal aviation laws, however, has held that the AHTA only prohibits charges upon air commerce that are "in form or substance a head tax or its equivalent," and, therefore, does not regulate landing fees. *Investigation Into Massport's Landing Fees*, FAA Docket 13-88-2. On appeal, the United States Court of Appeals for the First Circuit affirmed the Secretary's ruling. With proper deference to the Secretary's interpretation of the AHTA,⁸ the Court of Appeals held that

[the airport's] actions in enacting [the challenged landing fees] are outside the scope of § 1513, as not being a head tax or its equivalent. The landing fee is clearly not a "charge . . . on persons traveling in air commerce," nor is it a levy "on the carriage of persons" so traveling, "on the sale of air transportation," or "on the gross receipts derived therefrom."

⁸ The Secretary's interpretation of the AHTA is entitled to substantial deference. See, e.g., *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

New England Legal Foundation v. Massachusetts Port Auth., 883 F.2d 157, 170 (1st Cir. 1989).⁹

This Court should adopt the interpretation of the AHTA given by the Secretary of Transportation and by the First Circuit in *New England Legal Foundation* because it is consistent with the plain terms of the Act and with the Act's legislative history. The AHTA was enacted by Congress in 1973 as a direct response to this Court's decision in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). *Evansville* rejected a Commerce Clause challenge to airport head taxes (that is, taxes charged upon a per-passenger basis). 405 U.S. at 711, 720. As this Court noted in *Aloha Airlines*, in the wake of *Evansville*, Congress was concerned that a proliferation of local taxes would burden interstate commerce and impose double taxation on air travelers, when coupled with the separate federal tax that is levied upon each passenger's ticket. 464 U.S. at 9-10. In order to prevent this result, Congress enacted the AHTA.

Neither the language nor the legislative history of the AHTA suggest in any way that Congress intended through the AHTA to restrict in a new way the charges that airport operators levy upon aircraft operators for the use of airport facilities. The most sensible interpretation of § 1513(b) is that Congress wished to maintain and

⁹ The Court of Appeals also affirmed the Secretary's decision that Massport's landing fees were unreasonable and therefore unlawful under 49 U.S.C. App. § 2210(a)(1) and, as a result, also unlawful under 49 U.S.C. App. §§ 1305 and 1348. 883 F.2d at 168-170, 173-175. The Airlines never cited or discussed this case before this Court.

preserve, and not to duplicate or displace, the existing federal regulation of airport charges.

As early as in the Federal Airport Act of 1946 Congress directed the Civil Aeronautics Administrator to obtain an assurance, before approving the grant of federal funds to an airport, that "the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination."¹⁰ May 13, 1946, ch. 251, § 11, 60 Stat. 176 (1946), formerly codified as 49 U.S.C. § 1110(1). The Airport and Airway Development Act of 1970 (AADA), which greatly increased the scope of federal funding for airport development, reiterated this requirement. Pub. L. No. 91-258, Tit. I, § 18, 84 Stat. 229 (1970), formerly codified as 49 U.S.C. § 1718(1). The 1970 Act also added the requirement that the airport agree "to maintain a fee and rental structure for the facilities and services provided to airport users that would make the airport as self-sustaining as possible under the circumstances existing at that particular airport." Pub. L. No. 91-258, Tit. I, § 18, 84 Stat. 229 (1970), formerly 49 U.S.C. § 1718(8).

Consequently, there was no reason for Congress to enact the AHTA to regulate the reasonableness of airport aeronautical user charges because the federal aviation laws already had long required that they be reasonable and nondiscriminatory, and had delegated to the Secretary of Transportation (or predecessor) the responsibility

¹⁰ Virtually all of the airports in the United States serving commercial airlines receive federal funds for development projects. Brief for the United States as *Amicus Curiae* in Opposition to Petition for Certiorari, p. 15, n.11.

to enforce these requirements. In fact, since enactment of the AHTA in 1973, Congress has reconfirmed these requirements in the Airport and Airway Improvement Act of 1982 (AAIA), Pub. L. No. 97-248, Title V, § 511, 96 Stat. 686 (1982), 49 U.S.C. App. § 2210(a)(1) and (a)(9).

Both before and after the passage of the AHTA, Congress has consistently imposed in separate laws the requirements that an airport receiving federal funds give assurances satisfactory to the Secretary that the airport will be available "for public use on fair and reasonable terms and without unjust discrimination" and that it will maintain a fee and rental structure making the airport "as self-sustaining as possible." *Id.* These enactments confirm that it is not under the AHTA, but rather through federal grant assurances, that Congress intended to regulate the reasonableness of charges upon air commerce for the use of airport facilities.

Accordingly, this Court should affirm the Court of Appeals decision rejecting the Airlines' challenge to the Airport's landing fees and terminal rental charges on the ground that the AHTA only restricts the imposition of "head taxes" and their equivalents and does not provide any basis for the direct judicial review of the Airport's aeronautical user fees.

II. THE ANTI-HEAD TAX ACT PROVIDES NO PRIVATE RIGHT OF ACTION TO THE AIRLINES TO CHALLENGE AIRPORT USER FEES¹¹

Even if the Court determines that the AHTA was intended to regulate the reasonableness of Airport aeronautical user fees, the statute provides no basis for direct *judicial* review of their reasonableness. The AHTA does not by its own terms create a private right of action for the Airlines, and as this Court has noted, "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross & Co. v. Redington*, 442 U.S. 565, 571 (1979). In this case the Court should decline to imply a private right of action under the AHTA because there is no evidence that Congress intended to give a right of action to the Airlines to challenge airport user fees. Moreover, the Airlines have an adequate *administrative* remedy, and a simultaneous

¹¹ The Airport, alternatively, defends the judgment appealed from on the basis that the Airlines have no private right of action under AHTA. See, Reply of the Airport Respondents in Support of Motion of the United States for Leave to Participate in Oral Argument and for Divided Argument filed September 10, 1993. It is well established that a party may defend a judgment "on any ground that the law and the record permit that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). A holding by this Court that no private right of action exists under the AHTA would provide an alternate ground to affirm the Court of Appeals' dismissal of the Airlines' AHTA challenge to the Airport's landing fees and terminal rental charges. See also, *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956) (Court should decide issue regarding the maintenance of a proper relationship between the courts and the agency in matters affecting transportation policy).

judicial remedy would undermine and confuse the regulatory structure Congress has created.

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), this Court set forth the criteria to be used to determine whether Congress meant to create a private right of action when it enacted a statute that, like the AHTA, is silent on the subject. The *Cort* test presents a series of questions: First, are the Airlines "one of the class for whose *especial* benefit the statute was enacted" – that is, does the statute create a federal right in favor of the Airlines? Second, is there any indication of legislative intent, explicit or implicit, either to create such an Airline remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the Airlines? Fourth, is this an area relegated to state law? *Id.* at 78. Application of these criteria confirms that the Airlines have no private right of action to challenge the Airport's landing fees and terminal rental charges under the AHTA.

First, the language of the statute taken as a whole does not suggest that airlines were singled out for special benefit under the AHTA, particularly with respect to charges by airport operators for their use of airport facilities. Rather, the statute suggests that Congress sought to benefit the public at large, not air carriers in particular. Furthermore, even if the Airlines had an implied right of action under the prohibitory terms of § 1513(a) to challenge "head taxes" (or their equivalents) when they are levied by governmental entities which are *not* subject to regulation by the Secretary of Transportation, there is no indication that Congress sought to provide special protection to air carriers by referring in the permissive terms of

§ 1513(b) to "reasonable" airport user charges levied by airport operators that were already subject to regulation under the federal aviation laws.¹²

Second, there is no legislative history suggesting an intent to create a private right of action for air carriers to challenge airport user fees. S. Rep. No. 12, 93d Cong., 1st Sess. at 17-26 (1973); H.R. Conf. Rep. No. 225, 93d Cong., 1st Sess. at 5-6 (1973).

Third, a private right of action to challenge the reasonableness of airport landing fees and terminal rental charges levied by airport operators would be inconsistent with the overall federal legislative scheme for the uniform regulation of air commerce. The Secretary of Transportation (or predecessor) has been authorized by the Federal Aviation Act of 1958, as amended, to conduct investigations, issue orders and promulgate regulations to carry out the provisions of the Act, subject to exclusive review in the Court of Appeals. 49 U.S.C. §§ 1354(a)-(c), 1482(a) and 1486(a); *see*, 14 C.F.R. Pt. 13 (1993). The AHTA was enacted in 1973 as an amendment to the Federal Aviation Act and these administrative procedures have

¹² The scope of a private right of action under § 1513(a) to challenge airport charges that are specifically prohibited by the AHTA is not an issue here. That is, even if airlines have a right of action to challenge state taxation of their gross income, as they did in *Aloha Airlines*, 464 U.S. at 7, or "head taxes" levied upon their passengers, as they did in *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 15-16 (1st Cir. 1987), this does not mean that they have a right of action under the AHTA to challenge charges for the use of airport facilities that are mentioned only in the permissive provisions of § 1513(b) and are regulated administratively under § 2210.

always been available to enforce its requirements. More importantly, both before and after the AHTA was enacted, the Secretary of Transportation (or predecessor) has been directed to obtain assurances that airports have made their facilities available on "reasonable terms without unjust discrimination." 49 U.S.C. App. § 2210(a)(1). An aggrieved party may file a complaint with the Secretary, who can review the reasonableness of the challenged charges, subject ultimately to judicial review. 49 U.S.C. App. § 2218.

In recognition of this "administrative enforcement scheme," the Sixth Circuit correctly rejected the Airlines' claim to a private right of action under § 2210, a ruling not appealed by the Airlines. J.A. 24. Implying a private right of action under the AHTA to challenge Airport user fees which are subject to regulation under § 2210 would create the potential for conflict between the courts and the Secretary about how the "reasonableness" of charges upon aircraft operators for the use of airport facilities is to be determined. This undesirable result occurred in the confusing, parallel judicial and administrative proceedings that culminated in the First Circuit's decision in *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 158-59 (1st Cir. 1989), which unravelled a tangled web of conflicting rulings by the District Court and by the Secretary.¹³ In view of the long history of

¹³ The District Court, which recognized a private right of action under AHTA found Massport's landing fees to be reasonable, but the Secretary found them to be unreasonable under § 2210 on essentially the same record. 883 F.2d at 166-67. The Court of Appeals ruled that the Secretary's decision was controlling. 883 F.2d at 173. This case demonstrates the willingness and ability of the Secretary to enforce the "reasonableness" requirements of the AHTA.

delegating responsibility to the Secretary of Transportation (or predecessor) to use expertise to insure that airport charges are "reasonable and not unjustly discriminatory," it is highly doubtful that Congress meant (without expressly saying so) to provide for direct judicial review of the reasonableness of airport landing fees and terminal rental charges when it enacted the AHTA in 1973.

The fourth *Cort* test – whether the matter has been relegated to state law – does not assist the Airlines in their efforts to imply a private cause of action under AHTA. The Michigan statute requires that airport fees be reasonable and nondiscriminatory. Mich. Comp. Laws § 259.133 (1979) (Mich. Stat. Ann. § 10.233 (Callaghan 1991)).

In short, this Court should now hold that the AHTA provides no private right of action for the Airlines to seek judicial review of the Airport's landing fees and terminal rental charges. To hold otherwise would be inconsistent with the plain language of the AHTA, unsupported by any of its legislative history, and incompatible with the orderly and uniform administration of federal aviation policy by the Secretary of Transportation. Accordingly, on this alternate basis, this Court should affirm the judgment of the Court of Appeals rejecting the Airlines' claims under the AHTA.

III. THERE IS NO BASIS FOR REVIEWING THE AIRPORT'S FEES AND CHARGES UNDER THE COMMERCE CLAUSE

The Airlines argue that the Airport's charges should be reviewed under the Commerce Clause because it "has

long been understood to embody a negative prohibition against State action that unreasonably burdens interstate commerce." Airlines' Brief, p. 40. The Court of Appeals correctly rejected this claim on the ground that when Congress acts to regulate interstate commerce, dormant Commerce Clause analysis is not appropriate, and the only question is whether the statutory requirements imposed by Congress have been met. J.A. 30-31.¹⁴ The Airlines claim that because this Court considered the constitutionality of head taxes in *Evansville*, the Court of Appeals erred when it failed "even to consider such a claim here." Airlines' Brief, p. 40 (original emphasis). This argument, however, completely misses the point of this Court's Commerce Clause jurisprudence.

As held by this Court, the judiciary will engage in dormant Commerce Clause review "only . . . when Congress has not acted or purported to act. . . . When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional

¹⁴ In rejecting the Airlines' claims under the Commerce Clause, the Sixth Circuit aligned itself with the two previous Court of Appeals decisions on this question. See, *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262, 1266-67 (7th Cir. 1984) (refusing to consider Commerce Clause challenges to airport rates and charges after enactment of the AHTA); *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 174, 176 (1st Cir. 1989) (holding AHTA inapplicable to challenged landing fees, but nevertheless refusing to consider Commerce Clause claims based on the "reasonableness" requirements of AHTA).

action." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-27, 431 (1946)).

In the aviation arena Congress *has* acted by authorizing airport operators to impose reasonable charges for the use of airport facilities, and, therefore, the dormant Commerce Clause approach is not applicable. First, in the AATA's grant assurance provisions, Congress has specifically required that airports assure in ways that are "satisfactory to the Secretary" that their landing fees and terminal charges are "fair and reasonable" and that there is no "unjust discrimination." 49 U.S.C. App. § 2210(a)(1).¹⁵ Second, in the AHTA, Congress addressed "the issue of 'State taxation of air commerce,' detailing in § [1513](a) the kinds of taxes which are prohibited and in § [1513](b) those which are permissible." *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 6-7 (1986); accord, *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 n.6 (1983) (holding that in § 1513, Congress has

¹⁵ For this reason, this case does not present the Commerce Clause question the Airlines frame: "[w]hether the Commerce Clause is automatically rendered inapplicable to an area of commerce whenever the Congress takes any action at all to regulate that area." Airlines' Brief, p. i. The Commerce Clause question this case presents is whether judicial review under the Commerce Clause can be invoked when Congress has extensively occupied the field by prohibiting head taxes, by permitting reasonable and nondiscriminatory airport user fees, and by creating an extensive federal administrative mechanism to ensure the reasonableness of airport charges. Both lower courts correctly held that the Commerce Clause is not implicated in these circumstances.

chosen to make a distinction that "the courts are obliged to honor").¹⁶

In such circumstances, when Congress has acted, the challenged fees are "invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985) (because 12 U.S.C. § 1842(d) permits a bank holding company to acquire a bank located in another state only if that state permits such an out-of-state acquisition; thus, state regulation of such acquisitions is no longer subject to Commerce Clause challenge). See also, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421 (1946) (a state tax is no longer subject to Commerce Clause challenge once Congress has "taken affirmative action consenting to it or purporting to give it validity.")

As this Court has said, "[i]t would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply

¹⁶ The Airlines argue that § 1513(b) is a "savings clause" of the sort that does not preclude review under the dormant Commerce Clause analysis, citing *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982), and *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982). Airlines' Brief, p. 40. The thrust of *Sporhase* and *New England Power*, however, was that Congress had not otherwise spoken to the lawfulness of the state action covered by the savings clauses, so if review under the Commerce Clause were unavailable, there would be no federal protection whatsoever. Here, in contrast, when Congress enacted § 1513(b) to provide that the AHTA did not prohibit "reasonable" airport user charges, it had already acted to regulate the reasonableness of such charges in its grant assurance statutes. Accordingly, the Airlines' reliance upon the *Sporhase* line of authority is misplaced.

it in such a way as to reverse the policy that the Federal Government has elected to follow." *Wardair*, 477 U.S. at 12 (original emphasis). In *Wardair*, Chief Justice Burger summed up the situation exactly: "the plain language of § 1513(b) demonstrates . . . that there is *nothing* 'dormant' here." *Id.* at 14 (concurring).¹⁷

Because the "reasonableness" of an airport's landing fees and terminal rental charges is regulated by federal statute, either under the AHTA as contended by Airlines or under the AAIA as believed by the Airport, they cannot be subjected to review under the dormant Commerce Clause. If the charges meet the statutory "reasonableness" requirements Congress has imposed, as the Airport's do, it makes no sense for a court to find them to be "unreasonable" under the dormant Commerce Clause.¹⁸ Accordingly, this Court should affirm the judgment dismissing the Airlines' claims under the Commerce Clause.

¹⁷ In its brief as *amicus curiae* (p. 10 n.6), the American Trucking Association asserts that Chief Justice Burger "did not persuade a single colleague to join his concurring view that Section 1513(b) displaced Commerce Clause analysis." It is true that in the arena of *foreign* commerce, the Chief Justice alone found § 1513(b) to be dispositive. The rest of the members of the Court were uncertain about the application of the AHTA to foreign commerce. 477 U.S. at 6-7. They were not uncertain, however, that in § 1513(b) Congress had exercised its authority in interstate commerce and had unequivocally permitted states to impose in domestic *interstate* commerce the various charges described in § 1513(b). *Id.* at 7.

¹⁸ The illogic of such a result is accentuated by the fact that the Airlines would apply the *same* measure of reasonableness under the AHTA and under the Commerce Clause: the test articulated by the Court in *Evansville*. Airlines' Brief, p. 22. See, Pt. IV.A., below.

IV. THE AIRPORT'S FEES AND CHARGES TO THE AIRLINES ARE "REASONABLE" AS A MATTER OF FEDERAL LAW

Even if the Court determines, contrary to the above Points I, II and III, that the AHTA regulates the reasonableness of airport user charges and the Airlines have a private right of action under the AHTA or under the Commerce Clause to direct judicial review of the "reasonableness" of the challenged Airport charges, the Court should affirm the decision of the Court of Appeals because it is evident from the trial record that the challenged Airport charges are "reasonable."

Before this Court, the Airlines only challenge two Airport charges: landing fees, which are charged for their use of the airfield; and terminal rents, which are charged for their use of the passenger terminal building. As the District Court found, however, these two charges are based upon the "break even" cost to the Airport of providing these facilities to the Airlines and reflect the actual use they make of the airfield and passenger terminal. Pet. App. 28a and 37a. Significantly, neither this Court, nor Congress, nor the Secretary of Transportation, has ever given any indication that it is unreasonable for an airport to recover from aircraft operators the "break-even" costs of providing them with airport facilities so long as the charges are based upon rational measures of their relative use and are otherwise nondiscriminatory.

Section 1513(b) of the AHTA speaks to "reasonable" charges to "aircraft operators for the use of airport facilities." The AHTA, however, does not define the term

"reasonable," and nothing in the language or legislative history of the AHTA suggests that the term "reasonable" should have any unique interpretation. Consequently, all parties agree that the applicable "reasonableness" standard under the AHTA is the same as the three part test under the Commerce Clause articulated by this Court in *Evansville*. First the charges must be based on some "fair approximation of use"; second, the charge must not be "excessive in comparison with the governmental benefit conferred"; and third, the charge must not be "discriminatory against interstate commerce." 405 U.S. at 716-17. At trial, both the Airlines and the Airport directed their evidence to this standard, which was applied by both the District Court and the Court of Appeals, when holding the Airport's charges to be reasonable under the AHTA. Before this Court, the Airlines offer no alternative measure of "reasonableness" and once again structure their argument around the *Evansville* standard. Airlines' Brief, pp. 20-23. Because it is evident that the Airport's charges to the Airlines satisfy the *Evansville* "reasonableness" test, the Sixth Circuit's decision should be affirmed on the merits, even if the Court believes direct judicial review of Airport charges is appropriate.

A. Federal Law Permits the Use of Compensatory Rate-Making Methods

As the District Court found, airports commonly use either "compensatory" or "residual cost" methods to determine what to charge aircraft operators for the use of airport facilities. Pet. App. 27a. Here the Airport has consistently chosen to use a compensatory method and

therefore bases its charges to the Airlines on the actual costs of providing them with the airport facilities they use.¹⁹ Both the District Court and the Court of Appeals correctly concluded that the Airport's use of the compensatory method was not unlawful *per se*. Pet. App. 56-57a; J.A. 24-25. The Airlines' claim that the AHTA and the Commerce Clause prohibit the use of compensatory methods or require use of residual cost methods is unprecedented and without merit. Nothing in the AHTA or in the Commerce Clause prevents the owner of an airport from using a compensatory rate-making method to recover from airlines the actual costs of providing the airport facilities used by them. No federal statute and no precedent of this Court requires local governments to charge users less than actual costs. This Court's precedents confirm that the Commerce Clause does not dictate the choice of methods used to determine how a state charges for the use of facilities in commerce. As this Court said in *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915):

[W]here a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of those charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical

¹⁹ Residual and compensatory methodologies are discussed at page 3 hereof. See also, the Congressional Budget Office study, "Financing U.S. Airports in the 1980's" (April, 1984), at Chapter II (pp. 18-19), which summarizes the difference between the two methods.

standard, they constitute no burden on interstate commerce.

And as made clear by this Court in *Evansville*, there is under federal law no rigid formula or specific method for the proper recovery of airport costs:

At least so long as the toll [charge] is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users. 405 U.S. at 716-17.

The state is not required "to compute with mathematical precision" its costs of serving interstate commerce; if its charges "do not appear to be manifestly disproportionate to the services rendered, we cannot say from our knowledge or experience that they are excessive." *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939).

The use of compensatory rate-making is fully consistent with the essence of the *Evansville* standard that aircraft operators pay their fair share of the costs for the use of airport facilities. It is also fully consistent with the policy of the Secretary of Transportation, who is responsible for administering the federal aviation laws, that "airports are given wide latitude in selecting a particular rate methodology and fee structure. [A]s long as the charges to air carriers do not result in revenues that exceed by more than a reasonable margin an airport's costs in servicing those carriers." Brief of the United States as *Amicus*

Curiae on the Petition for Certiorari, p. 8. Accordingly, as both courts below have concluded, the use of a compensatory rate-making method by the Airport is not illegal *per se*.

B. The Airport's Landing Fees and Terminal Rental Charges Do Not Violate the AHTA or the Commerce Clause

1. The District Court Found the Airport Charges to be Reasonable

Because the use of compensatory rate-making methods is not illegal *per se* the Airlines could only have succeeded if they had proved at trial that, *as applied*, the Airport's compensatory method produced unreasonable landing fees and terminal rental charges. The fact is, the opposite is true. As the trier of fact, the District Court rejected the economic theory advanced by the Airlines and, instead, found that, with one exception,²⁰ the Airlines were charged the "break-even" cost for the areas which the Airlines utilized at the Airport, both airside and in the terminal area. Pet. App. 37a. Since by definition a "break-even" charge is reasonable, the Airlines' challenge to landing fees and terminal rental charges must be rejected. Indeed, the District Court expressly found

²⁰ This "exception" was the aircraft parking fee. The Airport did not appeal from the disallowance of the amount of this fee and that issue is not before this Court.

that the Airport's charges to plaintiffs are *reasonable* in light of the benefits conferred on plaintiffs in exchange for the landing fees and terminal rental rates. *Id.* (emphasis added).

This finding is dispositive.

The District Court's critical finding that the charges are "reasonable" may not be set aside unless "clearly erroneous." Fed.R.Civ.P. 52(a). *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). District Court rulings have been upheld under the "clearly erroneous" standard in a wide variety of cases, 5A Moore's Federal Practice ¶ 52.03[1] (1993), including disputes regarding accounting, leases, and determination of "reasonable" recoveries under a *quantum meruit* theory. *Id.* at n.19.

Since the Airlines cannot challenge the "break-even" cost finding of the trial court,²¹ the Airlines argue that even if *they* have only been charged the break-even costs for their own use of the airfield and terminal, the Airport's charges to the Airlines are nevertheless unlawful

²¹ Rearguing the evidence, the Airlines do attempt to claim that the Airport's charges go beyond cost recovery because, they say, the Airport has imposed "mythical 'carrying charges' " on its capital improvements that make its charges unreasonable. Airlines' Brief, pp. 34-36. This claim, however, was before the District Court who nevertheless found that the Airport only recovers its "break-even" costs from the Airlines. Pet. App. 28a. The Court of Appeals affirmed, and in a ruling ignored by the Airlines, the Court of Appeals specifically found that the use of an 8% imputed interest rate to establish the carrying charges was "reasonable and should not result in a net present value which exceeds the initial cost of the project." J.A. 29.

because the charges to general aviation users are too low and the Airport derives a surplus from concession revenues. Neither contention can withstand analysis.

2. The Lower Courts' Rulings on General Aviation were Proper

The Airlines argue that because the Airport has permitted general aviation to use the airfield without paying the landing fee, it is unreasonable or unjustly discriminatory to impose the landing fee on the Airlines. Airlines' Brief, pp. 37-40.²² Initially, it should be noted that, as found by the District Court, it is undisputed that the Airport has not shifted to the Airlines any of the costs of the use of the airfield by general aviation to cover the shortfall in general aviation costs. Pet. App. 38a. These costs have been recouped from nonairline users of the Airport. *Id.* Consequently, even if the Airport were required to make general aviation pay its full share of the airfield costs, the Airlines would not benefit because the costs of providing the airfield to them would be unaffected.

Moreover, since commercial air carriers and general aviation operators are completely different classes of user

²² These general aviation users, however, make other payments to the Airport to help defray the cost of using the Airport's facilities, including fuel flowage fees and hangar rentals. Pet. App. 29a. Such general aviation "fuel flowage" fees are common. Congressional Budget Office study entitled "Financing U.S. Airports in the 1980's" at p. 29 (April, 1984). The AAIA also specifically refers to and sanctions "local taxes on aviation fuel." 49 U.S.C. App. § 2210(a)(12).

who do not compete with each other, any failure to recoup the full costs of use of the airfield by general aviation does not unjustly discriminate against the Airlines.

The dormant Commerce Clause "prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988). *Accord, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 527 (1935). No question is raised under the Commerce Clause, however, when a state treats non-competitors differently for purposes of taxation or regulation. For example, in *Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961), this court held that since "freezer ships" bringing salmon to out-of-state canners "do not compete with those who freeze fish for the retail market," as distinguished from those taking their catch to Alaskan canners, Alaska's decision to levy taxes on the first category but not on the second did not implicate the Commerce Clause. The Airlines have offered no argument that the AHTA imposes a different standard of unjust discrimination, and there is nothing in its language or in its legislative history to suggest that it does.

In this case, any differential treatment as between commercial air carriers and general aviation is immaterial because they are not the same category of user and are not economic competitors. The District Court made a finding of fact, which the Sixth Circuit adopted, that "[g]eneral aviation aircraft are corporate aircraft and privately owned aircraft that are not in commercial, passenger, cargo or military service." Pet. App. 25a; J.A. 17.

In contrast, as the Court of Appeals noted, the Airlines "are engaged in 'the carriage by aircraft of persons or property as a common carrier for compensation or hire . . .'" (quoting 49 U.S.C. App. § 1301(24)). J.A. 28. These findings demonstrate that general aviation does not compete with commercial air carriers and, accordingly, can validly be treated differently under both the Commerce Clause and the federal aviation statutes.²³

Indeed, in *Evansville* this Court made it clear that a state may constitutionally impose an airport user fee on commercial air carriers or their passengers without imposing the same fee on "noncommercial flights." 405 U.S. at 717-19. More specifically, this Court held that airport charges imposed on each passenger boarding a scheduled commercial airliner, but not imposed upon "passengers on noncommercial flights" reflected a rational distinction between different classes of airport users and thus did not violate the Commerce Clause.

Even though the Airport does not collect from general aviation users the full costs associated with their use of the airfield, the fees charged the Airlines are not unreasonable since the Airlines do not pay the Airport for any shortfall in general aviation payments. The charges are not discriminatory because airlines do not compete with general aviation operators.

²³ The AAIA makes it clear that it is only discriminatory or differential treatment of types of air services which are of the same class that is prohibited by the aviation statutes. See, 49 U.S.C. App. § 2210(a)(1)(A) and (B).

3. The Airport Surplus is Consistent with Federal Law

The Airlines argue that they should pay less than the Airport's actual costs of providing the aeronautical facilities they use because the Airport is able to accumulate surplus revenues from its nonaeronautical concessionaires. Airlines' Brief at 40. The Courts below correctly rejected such argument since the Airport has not generated any of its "surplus revenues" from the rates paid by the Airlines. The Airlines thus have not been harmed by the Airport's accumulation of surplus from concession revenues.

The Airlines also continue to argue (Airlines' Brief at 27-28) without any evidentiary support that the Airport has a surplus so far in excess of any possible future needs that somehow this surplus renders the Airline charges unreasonable.²⁴ The Airlines completely ignore the fact that the Airport's anticipated capital needs in the ten year period from 1990 to 2000 total more than \$40,000,000.00

²⁴ No Airline witness, qualified by actual airport or FAA experience, testified in support of the Airlines' surplus contentions. Nor was it shown that the surplus violated any statute or FAA rule or regulation. The Airlines unsuccessfully attempt to bolster their argument by taking out of context the "earthquake" comment in the testimony of Airport economist expert witness Ferdinand Levy. Reference to the California earthquake that had occurred only weeks before at the deposition location of Charles T. Horngren (and also immediately before the Ferdinand Levy deposition) was never meant to suggest that this airport in Michigan was retaining earnings in anticipation of an earthquake. J.A. 190.

for projects eligible for partial federal funding. Additionally, the Airport anticipates \$11,000,000.00 in capital projects which are ineligible for any federal aid.

In 1990, Congress recognized that there was a critical need for additional capital development at U.S. airports beyond that which can be funded by surpluses from concession revenues and by federal aid. In the Aviation Safety and Capacity Expansion Act of 1990, Congress amended the AHTA to permit airports, with the approval of the Secretary of Transportation, to institute a Passenger Facility Charge (PFC) of \$1, \$2 or \$3 per enplaning passenger to help defray the cost of airport development programs. Pub. L. No. 101-508, Tit. IX, 104 Stat. 1388 (1990), 49 U.S.C. App. § 1513(e). Congress approved these new PFCs at the nation's airports because it understood that "every airport in this country has unmet needs. It is estimated that nationwide we have \$10 billion of need each year for the next 10 years." 136 Cong. Rec. H6298-304. The Airport applied for and in September 1992 received approval from the Secretary to institute a PFC to help pay for the significant extending and widening of a commercial airline crosswind runway (and related facilities), including necessary land acquisition. 57 Fed. Reg. 49,109 (1992). The total cost of the project is approximately \$46,000,000.00 of which approximately \$12,500,000.00 will come from PFC funds. The remaining \$33,500,000.00 balance of the project will be paid for by a combination of federal aid, state funds and Airport-generated funds.

Based on capital needs in the next ten years of over \$50,000,000.00 and the uncertainty of future federal aid, the Airport's \$9,000,000.00 surplus at the time of trial reflects "prudent management" as acknowledged by the

District Court, rather than an unlawful excess as claimed by the Airlines. Pet. App. 39a. Under the AAIA and related grant assurances, the Airport surplus can only be used for Airport purposes. 49 U.S.C. App. § 2210(a)(12). The AAIA does not restrict airports from accumulating surpluses but rather encourages airports to do so, since airports are required to have a rate structure that allows them to be as self-sufficient as possible. 49 U.S.C. App. § 2210(a)(9).²⁵ Here it is uncontested that all Airport revenues have been used for Airport purposes. In fact, Kent County has never even been reimbursed for its \$5,500,000.00 investment in the Airport. J.A. 129-30.

The Airlines also argue that the Airport's compensatory method is prohibited under both the AHTA and the Commerce Clause because in allocating its costs among users, the Airport does not take into account the *benefits* that the airfield and terminal provide to concessionaires and the resulting revenues the Airport derives from concessionaires. Airlines' Brief, pp. 23-26.²⁶ Initially, it

²⁵ Even if the Airport were compelled to lower its charges to its concessionaires because such charges were found to be excessive and unlawful (as Thrifty Rent-a-Car, as *amicus curiae*, urges at p. 5), the Airlines would not benefit, because the costs of providing the airfield and terminal to them would not be reduced. The Airlines, however, are not protesting that the Airport's revenues are excessive because its concession rates are too high. Instead, the Airlines are seeking to receive concession revenues through a reduction in their own fees. The interests of the Airlines are thus adverse to the interests of the concessionaires, including Thrifty Rent-a-Car, which seeks a decrease in concessionaire charges.

²⁶ During the course of this action, the Airlines have shifted their arguments but not their objective. Sometimes the Airlines

should be noted that this argument is apparently based upon the erroneous *assumption* that the Airlines have "created the Airport's passenger flow"²⁷ and, therefore, are somehow entitled as a matter of federal law to any concession revenue that exceeds the Airport's actual costs. More importantly, however, this argument has no support in the precedents of this Court under the Commerce Clause or in the language of the AHTA.

In essence the Airlines' claim is that both the AHTA and the Commerce Clause dictate the use of a residual cost rate-making method that would credit concession revenues to the Airlines and thereby reduce their

have argued that the Airport should be required to "cross-credit" concession revenues against the airfield and terminal costs that are borne by the Airlines. At other times, the Airlines have argued that the Airport should recognize the benefits derived by the concessionaires by allocating to the concessionaires some of the costs of the airfield and terminal space that the Airlines use. Whatever argument is used by the Airlines, the result the Airlines seek has always been the same: to force the Airport to accept from the Airlines *less than the actual costs* of providing the Airlines with the facilities they use.

²⁷ The Airlines are not, in fact or in economic theory, responsible for the passenger flow at the airport. J.A. 158-61, 184-86 and 191-92. Rather, as shown by the testimony of the Airport's expert witnesses Brown and Levy, the demand for travel by business persons, by vacation travelers, by family visitors, and by government and military personnel to and from the metropolitan and regional Grand Rapids area creates the passenger flow through the terminal and its immediate environs. The community population and business base, not the Airlines, are responsible for the "derived demand" for air travel. J.A. 184-86.

charges.²⁸ No court has ever recognized such a right under the Commerce Clause and the *only* decision that has sustained such a claim by the Airlines under the AHTA is *Indianapolis*. There, a divided panel of the Seventh Circuit held that in view of the locational monopoly of the Indianapolis Airport and the fact that, with rare exception, airline passengers are the users of airport concessions, it was a violation of the AHTA for the Indianapolis Airport to ignore airport concession revenues in setting airline fees and charges. 733 F.2d at 1266-68. In this regard, the Seventh Circuit's decision in *Indianapolis* has never been followed by any other court nor accepted by the Secretary of Transportation as a correct statement of law.

Initially it should be noted that the decision in *Indianapolis* is distinguishable, since, as pointed out by both courts below, the Airport does not have a locational monopoly and the people who use concessions at the Airport include nonairline passengers. Pet. App. 33a; J.A.

²⁸ The Airlines completely ignore the fact that residual cost rate-making requires special voluntary agreements between an airport and the airlines which detail how risks, revenues and management will be shared. In such residual cost agreements the Airlines, in exchange for guaranteeing the solvency of the airport, customarily control their airport financial risks by requiring "majority in interest" (MII) clauses which require that a majority of the airlines agree to the amount and type of major airport capital improvements. J.A. 40-42 and 46-47. Every suggested airport rate methodology offered at trial by the Airlines to replace the Airport's historic compensatory methodology was a form of "residual" methodology, confirming the Airlines' efforts to impose a residual cost methodology upon the Airport. J.A. 85.

24. More importantly, however, the decision in *Indianapolis* was wrong, and this Court should reject its rationale.

First, the *Indianapolis* court completely overlooked the preeminent regulatory authority of the Secretary of Transportation and improperly placed itself in the role of a regulatory agency. The assumption of the court in *Indianapolis* that "[n]o agency has regulatory authority over the rate practices of the Indianapolis Airport Authority," (733 F.2d at 1268) completely ignores the fact that from as early as the Federal Airport Act of 1946, and continuing down through the present time with the Airport and Airway Improvement Act of 1982, the Secretary of Transportation has been continuously delegated responsibility by Congress to insure that commercial airports are "available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. § 2210(a)(1). Thus, the whole premise of the *Indianapolis* decision, that there is a regulatory vacuum, is wrong. In respectfully declining to follow *Indianapolis*, the court in *City and County of Denver v. Continental Airlines, Inc.*, 712 F. Supp. 834, 839 (D.Colo. 1989), correctly observed that "nothing in the history and purpose of the Anti-Head Tax Act indicates that Congress intended the courts to act as a public utility commission and intervene in the setting of airport rates and charges through the adoption or rejection of any particular type of cost accounting methodology."

Second, the *Indianapolis* Court ignored the fact that the AHTA, by its plain terms, does not apply to concession revenues. The only user fees referred to in § 1513(b) are "reasonable rental charges, landing fees, and other

service charges from *aircraft operators* for the use of airport facilities." 49 U.S.C. App. § 1513(b) (emphasis supplied). The concurring opinion in *Indianapolis*, in rejecting reliance on the AHTA, correctly observed that

. . . 1513(b) clearly applies only to fees charged to "aircraft operators." It does not apply to fees assigned to concessionaires. The majority opinion thus has expanded the reach of the statute and created regulation of the system where Congress clearly had no intention to regulate. 733 F.2d at 1274.

Similarly, the court in *Denver* and both courts below correctly held that concession revenues are not within the scope of the AHTA. Additionally, the Court below, quoting from the decision in *Denver*, illustrated the erroneous nature of the finding in *Indianapolis* that there is no material difference between charges for aeronautical services and charges for concessions. The critical difference, as noted by the Court below, is that passengers *must* make "use of the airport's runways, taxiways and airline portions of the terminal area," but a passenger *is not* required to make use of concessions. In other words, unlike the use of aeronautical services where "the air passenger is captive and her purse is necessarily and directly affected by . . . [airport] charges to the airlines[,] the use of concessions is determined by "individual decisions driven by individual perceptions of need and economic values." J.A. 24 (quoting *Denver*, 712 F. Supp. at 838-39).

The Airlines argue, however, that even if the AHTA does not regulate concession charges, it nevertheless requires that the Airport allocate to the concessionaires some of the costs of the airfield and terminal space only

the Airlines use because, the Airlines say, the concessionaires "benefit" from these facilities. The Airlines do not suggest, however, that their *own* charges for the use of the airfield and terminal should reflect the benefits (e.g., locally generated ticket revenues) the Airlines *themselves* derive from the Airport and local community.²⁹ Moreover, in making this argument the Airlines distort this Court's holding in *Evansville*. *Evansville* speaks in terms of charges not being "excessive in comparison with the government benefit conferred." *Evansville* does not suggest that Airline charges must be reduced to reflect "government benefits conferred" on some other user.

The Court of Appeals for the First Circuit appears to be the only other court that has spoken on the question of "benefits-based" airport rate-setting under the *Evansville* standard. In *American Airlines, Inc. v. Massachusetts Port Auth.*, 560 F.2d 1036, 1038-39 (1st Cir. 1977), unlike here, the issue was whether the Airlines could be charged for airport capital expenditures, as to which the Airlines claimed to receive no benefit. Even in that context, the First Circuit Court of Appeals rejected the Airlines' argument, holding that "the overwhelming thrust" of *Evansville* is to compare the charges with the airport's costs. *Id.*

²⁹ If the Airlines were charged based upon their "benefits" instead of the Airport's actual costs, Airline charges would be substantially more. As found by the District Court the totality of all types of the earlier Airport's 1986 and 1987 charges to the Airlines represented only 1.2% of the Airline ticket revenues generated by flying in and out of the Airport. Pet. App. 37a. The totality of the challenged user fees, if applied for all of 1988, represented only 1.5% of the 1988 Airline ticket revenues generated by using the Airport. Pet. App. 37a.

The First Circuit then questioned whether a benefits measure would make any sense:

[W]e cannot see how a federal system, recognizing state sovereignty, could work on a basis of customer judgments of benefits received. . . . If such taxes as landing fees were to be subject to attack from each user, depending upon the particular utility, their imposition could be a matter of endless and shifting controversy. Such an approach would subject every taxing authority to the judgments of courts as to the wisdom, the foresight, and the efficiency of its plans from the viewpoint of each affected customer.

Not only would the airports be subject to uncertainty, in effect having to aim their tax plans at a moving target, but the courts would find themselves involved in long trials attempting to adjudicate the quantum of benefit received by an airline, the normative ratio between benefit and tax, and the amount of reasonable cost which could be properly allocated to the users. We do not think that states are held to such a punctilio of proof. *Id.*

In fact, the Airlines have never offered a coherent statement of how to apply the "benefit" method they claim is required.

Finally, it defies common sense to hold, as did the court in *Indianapolis*, that Congress, by its use of the term "reasonable" in AHTA, intended to *sub silentio* overrule the use of compensatory rate-making. The undisputed record here is that the Airport was utilizing compensatory rate-making at least as early as 1969, four years

before the AHTA was enacted. Compensatory rate-making is used by many other airports around the country.³⁰

For all of the above reasons, the Airlines' invitation for this Court to embrace *Indianapolis* is misplaced. *Indianapolis* wrongly placed the court in the role of a public utility commission based on the patently erroneous premise that no federal agency has jurisdiction over airport rates and charges. Then, wrongly acting as a public utility ratemaker, the *Indianapolis* court ignored the fact that the AHTA by its own terms does not apply to concession revenues. Further, the *Indianapolis* court blurred a critical difference between airport-supplied aeronautical facilities which the passenger must use and concession facilities whose use is discretionary. Finally, it expanded the meaning of the word "reasonable" beyond any plausible interpretation to hold that the AHTA's reference to "reasonable rental charges [and] landing fees" precludes cost-based rate-making which was well established before the AHTA was enacted.

In short, *Indianapolis* is an aberrant decision which, not surprisingly, has not been followed by any other court and whose erroneous reasoning should be squarely rejected by this Court.

³⁰ The 1984 Congressional Budget Office Study on U.S. Airport Financing found that 42% of the nation's large and medium sized airports then utilized compensatory rate-making.

CONCLUSION

For all of these reasons, this Court should affirm the lower court judgment to the extent it has been appealed by the Airlines.

Respectfully submitted,

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No. 92-97

Supreme Court, U.S.
FILED

OCT 22 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC.,
USAIR, INC., AMERICAN AIRLINES, INC., and UNITED
AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS, and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In their opening brief, the Airlines¹ showed that the fees imposed on them by the Airport are unreasonable under the Anti-Head Tax Act ("AHTA") and the Commerce Clause because (1) the fees allocate *none* of the Airport's airside costs to the concessions, even though the concessions, like the Airlines, benefit enormously from the facilities and services that generate those costs; (2) the fees are designed to, and do, generate revenues that vastly exceed the Airport's costs and produce huge surpluses far beyond any reasonable Airport needs; and (3) the fees deliberately discriminate against the Airlines by charging them their full allocated costs (as calculated by the Airport) but charging general aviation less than one-fifth of its allocated costs.

In response, neither the Airport nor the Solicitor General denies the misallocation of costs, the production of the huge surpluses, or the intentional discrimination. Instead, they both spend the bulk of their briefs contending either that Congress never intended to prohibit unreasonable airline fees *at all* under the AHTA or, if it did, that it did not intend to let the Airlines sue to challenge such fees. They therefore ask the Court to decline to entertain the Airlines' challenge in this case.

The Court should not accede to this request. For as we will show: (1) the Airport's contention that the AHTA does not prohibit unreasonable fees is frivolous and not properly before the Court; (2) its half-hearted attempt to defend the fees on the merits cannot alter the fact that the fees plainly violate all three of the requirements established by this Court in *Evansville*; (3) even if the fees were found reasonable under the AHTA on the ground Congress did not intend for concession fees to be considered under that statute, there is no indication that it intended courts to ignore the effect of such fees under a

¹ For the Airlines' statements pursuant to Sup. Ct. Rule 29.1, see Petition for a Writ of Certiorari at ii.

Commerce Clause analysis; and (4) the Airlines' right to challenge the Airport's fees is not properly before this Court and, even if it were, the Airlines plainly have such a right, whether under the AHTA, the Commerce Clause, the Supremacy Clause, or 42 U.S.C. § 1983.

ARGUMENT

I. THE ANTI-HEAD TAX ACT PROHIBITS UNREASONABLE AIRPORT FEES

In an effort to avoid the merits of this case, the Airport now argues for the first time that unreasonable fees are not prohibited by the AHTA at all. *See* Airport Br. 16-21. Because this argument was not raised below, the Court should decline to consider it. *See, e.g., Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980). In any event, the argument is contradicted by the statute's plain language and its legislative history.

The AHTA bans not only the per-passenger "head taxes" at issue in *Evansville*, but further provides that "[n]o State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce" 49 U.S.C. App. § 1513(a) (emphasis supplied). Under this unambiguous language, the fees at issue are plainly "fee[s]" or "other charge[s]" levied both "indirectly" on "persons traveling in air commerce" and "directly" on "the carriage of persons traveling in air commerce."² Such fees would therefore be prohibited altogether by § 1513(a), were it not for the savings clause in § 1513(b). The latter provides that "[n]othing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting *reasonable rental charges, landing*

² Congress deemed it irrelevant whether prohibited charges are levied directly on passengers, or indirectly on airlines, because either way "the end result is to raise the cost of air travel." S. Rep. No. 12, 93d Cong., 1st Sess. 22 [hereinafter "Senate Report"], reprinted in 1973 U.S.C.A.N. 1434, 1451.

fees, and other service charges from aircraft operators for the use of airport facilities" (emphasis supplied).

Thus, the AHTA clearly prohibits all fees on aircraft operators except those that are "reasonable"—that is, it prohibits all unreasonable fees. The Airport's new contrary interpretation both ignores the plain language of § 1513(a) and renders the relevant language of § 1513(b) meaningless.³ Obviously, if § 1513(a) would not otherwise effectively prohibit *all* fees on aircraft operators, the provision in § 1513(b) excepting certain "reasonable" fees on those operators would be pointless. And even if § 1513(a) did not otherwise prohibit all fees on aircraft operators, Congress' express approval only of "reasonable" fees on such operators cannot be read as anything other than a disapproval of unreasonable fees.⁴

II. THE AIRPORT'S FEES ARE UNREASONABLE UNDER THE ANTI-HEAD TAX ACT

The Airport agrees that the *Evansville* standards govern the reasonableness of its fees, and the Solicitor Gen-

³ In support of its interpretation, the Airport relies on *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 170 (1st Cir. 1989). *See* Airport Br. 18-19. To the extent that case suggested that airline user fees are not within the scope of the AHTA, it is at odds with the First Circuit's own decision in *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 16 (1st Cir. 1987), and conflicts with every other decision to have addressed the issue. *See, e.g., J.A. 22* (Sixth Circuit holding); *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262, 1265 (7th Cir. 1984); *City and County of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834, 839 (D. Colo. 1989) (there is "no doubt" that § 1513(a) encompasses airline user fees "because they are indirect charges on the carrying of persons in air commerce"); *Rocky Mountain Airways, Inc. v. County of Pitkin*, 674 F. Supp. 312, 315 (D. Colo. 1987) (same).

⁴ Even the Secretary of Transportation states that the AHTA "require[s] user fees imposed on aircraft operators to be 'reasonable.'" U.S. Br. 11. The Airport asserts that the Secretary has previously embraced its interpretation, and that the Secretary's views are entitled to deference. It suffices to say, however, that the Secretary has *not* espoused the Airport's interpretation in this case.

eral appears to agree as well.⁵ Yet nothing in their briefs can justify the fees under those standards.

A. The Airport Unreasonably Overcharges the Airlines For Their Use of Airport Facilities

As the Airport recognizes, under *Evansville* airport users may be charged only for their "fair share" of airport costs (Airport Br. 34) and, as the Solicitor General notes, such costs must be "properly allocated." U.S. Br. 7. This accords with *Evansville's* requirement that user fees be "based on some fair approximation of use or privilege for use." 405 U.S. at 716-17. Nevertheless, the Airport allocates virtually all of its "air-operations" costs (costs associated with runways, taxiways, and the like) to the Airlines and general aviation and *none* to the concessions, notwithstanding that the concessions are

⁵ See Airport Br. 32; U.S. Br. 23-29; see also Br. of Airports Council Int'l 13. One of the Airport's amici notes that Congress believed that *Evansville* "did not sufficiently define the ruling as, for example, what constitutes a reasonable charge" Br. of the U.S. Conference of Mayors, *et al.* 15 (quoting Senate Report at 17, 1973 U.S.C.C.A.N. at 1446). Read in context, however, this passage shows only that Congress disagreed with *Evansville's* specific holding that head taxes were "reasonable" under this Court's precedents. It does not show that Congress contemplated a different legal standard to evaluate the reasonableness of the user fees it expressly permitted in § 1513(b), and no party has suggested any standard other than the *Evansville* test.

The Airport contends that the determination of "reasonableness" under the AHTA is a finding of fact subject to the "clearly erroneous" standard of review. Airport Br. 36. This is clearly wrong. The facts relating to the Airport's fees are undisputed and, as with the Commerce Clause challenge in *Evansville*, whether those fees are "reasonable" is a question of law for this Court. See, e.g., *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984) (Rule 52(a) does not prevent an appellate court from correcting "a finding of fact that is predicated on a misunderstanding of the governing rule of law"); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963) ("[i]nsofar as [a] conclusion derive[s] from the court's application of an improper standard to the facts, it may be corrected as a matter of law"); *Postal Tel.-Cable Co. v. New Hope*, 192 U.S. 55, 63 (1904) (in rate cases, "the reasonableness of an ordinance is a matter of law for the court").

also huge beneficiaries of those operations. See Airline Br. 23-26. The inevitable result of this misallocation is that the Airlines are paying more than their fair share of those costs.

The Airport does not even attempt to defend this misallocation, and instead makes three unresponsive points. First, it asserts that this Court may not inquire into the reasonableness of its cost allocation because the District Court "found" that the Airport imposed only "break even" charges upon the Airlines. See Airport Br. 15, 31, 35. But the District Court's statement that the fees on the Airlines "break even" with the costs of the facilities used by them is an ultimate *legal* conclusion that begs the question whether those costs are fairly *allocated* among Airport users. If those costs are not allocated based on "some fair approximation of use"—and here they are not because none are allocated to concessions—then as a matter of law the Airlines are necessarily paying more than their "break even" share of those costs.⁶

Next, the Airport contends that the customer flow at the Airport is not created by the Airlines, but by the people of Grand Rapids. *Id.* at 43 n.27. Again, this begs the question. The indisputable fact is that the Airport expends significant costs on air-operations, and those costs in turn help produce a customer flow to *both* the Airlines and the concessions. Yet the concessions are allocated none of those costs. As a result, just as the Court of Appeals found it unreasonable for the Airport to allocate general aviation none of the costs of the crash, fire and rescue operations even though it receives a "substantial benefit" from those operations (J.A. 27), so too is it unreasonable for the Airport to ignore com-

⁶ It is therefore not true, as the Airport repeatedly contends, that "the Airlines seek . . . to force the Airport to accept from the Airlines *less than the actual costs* of providing the Airlines with the facilities they use." Airport Br. 43 n.26. The Airport is entitled to *fully recover all* its costs, but it must fairly allocate those costs among the various users who benefit from them.

pletely the substantial benefits the concessions receive from the air operations.⁷

Finally, the Airport complains that it is being asked to give up its "compensatory" methodology of ratemaking (Airport Br. 33), that the Airlines seek to dictate precisely how it should assess its rates (*id.*), and that the Court is being asked to engage in complex cost-allocation calculations (*id.* at 48-49). On a contradictory note, the Solicitor General faults the Airlines for *failing* to demonstrate precisely how the Airport should allocate its costs. See U.S. Br. 24. None of this is correct and none of it is responsive to the simple legal contention being made.

The Airlines do not ask this Court to calculate an appropriate allocation of costs; nor were the Airlines required to do so themselves. Indeed, the Airlines agree that the Airport has discretion to choose from a wide range of permissible methodologies in allocating costs. The Airlines ask the Court to hold simply and only that a methodology is necessarily unreasonable where, as here, it makes no attempt whatsoever to fairly approximate user benefits because it allocates *no* airside costs to concessions.⁸ Such a holding will not preclude airports from adopting "compensatory" methodologies; quite the con-

⁷ Contrary to the Airport's contention (Airport Br. 48), allocating costs based on benefits is not novel or unduly complex. Rather, it is a standard method of cost accounting, and one that the federal government has recognized is necessary to fairly allocate costs to government contracts. See 48 C.F.R. § 31.201-4(b) (1992) (costs are to be allocated "in reasonable proportion to the benefits received"); C. Horngren & G. Foster, *Cost Accounting: A Managerial Emphasis* 460 (7th ed. 1991) (allocating costs according to benefits received is a standard cost-accounting criterion) (Prof. Horngren, a noted cost-accounting expert, testified for the Airlines at trial).

⁸ As Judge Posner explained in *Indianapolis*, there is no "single valid method" of calculating fees, and no cause for a court to "tell [the Airport] what fees it must charge." 733 F.2d at 1270. Rather, the Court is being asked only to "invalidate an unreasonable rate," not to "fix the reasonable rate." *Id.* See also *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 397-99 (1894).

trary, it will ensure that the fees imposed under such methodologies fully compensate airports based on the relative benefits received by *all* airport users.

B. The Airport Unreasonably Imposes Fees That Generate Substantial Excess Revenues

Under *Evansville*, user fees must not be "excessive in relation to the costs incurred by the taxing authorities." 405 U.S. at 719. Thus, as the Solicitor General acknowledges, "rates and charges should ordinarily correspond to the costs incurred in providing related facilities and services" and "revenues may not be accumulated indefinitely or in unlimited amounts." U.S. Br. 25, 27.⁹ The Airport plainly violates these requirements, for it is indisputable that the Airport's fee methodology accumulates enormous surpluses for no purpose whatsoever.

In response, the Airport claims that the proposition that it is generating excessive revenues is "without any evidentiary support." Airport Br. 40. In fact, the undisputed trial testimony showed that the Airport is earning huge surpluses even accounting for *every* conceivable capital project it could imagine for the future.¹⁰ And in any event, the Airport does not even attempt to refute the Airlines' contention that the AHTA does not allow it to

⁹ The Solicitor General's own statement of the law belies his assertion (see U.S. Br. 26 n.14) that the Airlines have "seriously mischaracterize[d]" this Court's statement in *Evansville* that fees must not "do more than meet . . . past, as well as current, deficits." 405 U.S. at 720. Moreover, the Court clearly stated that the operative inquiry is whether "the funds received by local authorities . . . are . . . shown to exceed their airport costs" (*id.*), which is unquestionably true here.

¹⁰ See Picardat Testimony at 847-58 (J.A. 130-38); Pederson Testimony at 774-77 (J.A. 123-26). Oddly, the Airport claims that its case is strengthened because it may now reap an additional \$12,500,000 through "passenger facility charges." See Airport Br. 41. To the contrary, this new source of substantial revenue (whose statutory basis had not been enacted at the time of trial) demonstrates even more clearly the excessiveness of the Airport's fee methodology and the surpluses it creates.

charge users for the speculative costs of future facilities that may not even be built. *See* Airline Br. 36.

Because it is unable to deny or justify its creation of unreasonable surpluses from airport users, the Airport argues, alternatively, that its "surplus revenues" are generated at the expense of concession users, not the Airlines, and "[t]he Airlines thus have not been harmed by the Airport's accumulation of surplus" Airport Br. 40. Furthermore, the Airport says, airport users can choose not to patronize the concessions. *Id.* at 46.

None of this can validate the fees under the AHTA. The Airport does not—and cannot—dispute that the surpluses derived from concession fees *do* harm the Airlines because those surpluses are earned from the Airlines' passengers and therefore unreasonably increase the total costs of air travel—the precise evil the AHTA was designed to prohibit. *See* Airline Br. 30-34.¹¹ It is irrelevant whether some passengers might theoretically be able to cease patronizing concessions; for it is undisputed that they *are* in fact continuing to do so and are thereby funding the Airport's unreasonable surpluses. The fact that airport users choose to pay unreasonable fees does not make them any the less unreasonable.

Finally, the Airport claims that the Airlines improperly seek a "cross-credit" of all concession revenues that exceed the Airport's costs. *See* Airport Br. 43 & n.26.¹²

¹¹ The Airport asserts, without evidentiary support, that some concession revenue is earned from people other than airline passengers. *See* Airport Br. 44. However, it is undisputed—and the Airport in fact conceded below—that airline passengers constitute the vast majority of the concessions' customers. *See* Airline Br. 7 n.8; Airport Memorandum in Support of FRCP 56 Motion for Partial Summary Judgment 7 (R. 47).

¹² The Airport does not even attempt to defend its "carrying charges," which result in a recovery for the Airport of two to three times its capital expenditures and whose unreasonableness has nothing whatsoever to do with concession revenues. Contrary to the Airport's contention (*see* Airport Br. 36 n.21), the Airlines most certainly have disputed the Court of Appeals' holding that such charges are "reasonable." *See* Airline Br. 34-36.

This is not so. The Airlines simply ask this Court to set aside the Airport's fee methodology as unreasonable because it generates enormous surpluses from the Airlines and their passengers far in excess of the Airport's costs. If the Court does so, the Airport will thereafter be free to implement *any* methodology that allows it to be "self-sustaining" (49 U.S.C. App. § 2210(a)(9)) and to "meet . . . past, as well as current, deficits." *Evansville*, 405 U.S. at 720.

C. The Airport Unreasonably Discriminates in Favor of General Aviation

Finally, the Airport does not dispute that it discriminates against the Airlines in favor of general aviation, and in fact admits that "the Airport does not collect from general aviation users the full costs associated with their use of the airfield" Airport Br. 39.¹³ Instead, it asks the Court to ignore this discrimination because, it claims, the Airlines do not compete with general aviation and would not benefit if general aviation were required to pay its fair share. *Id.* at 37-39.

These arguments cannot justify the Airport's blatant discrimination or make it any the less unjust. While the question of competition may in some instances be relevant under the Commerce Clause, the AHTA was intended to prohibit *all* unjust discrimination among users of airport facilities¹⁴ including, specifically, discrimina-

¹³ This distinguishes this case from *Evansville*, where the Court found that the differing charges imposed on commercial airlines and general aviation were rationally related to their differential use of airport facilities. *See* 405 U.S. at 718-19. Here, general aviation is charged only 20% of the costs that the *Airport itself* has allocated to it.

¹⁴ All parties agree (*see* Airline Br. 29 n.33) that the AHTA's "reasonableness" requirement must be read in light of the Airport and Airway Improvement Act of 1982 ("AAIA"), which specifically requires that airports be "available for public use on fair and reasonable terms and without unjust discrimination" 49 U.S.C. App. § 2210(a)(1).

Similarly, the question whether the Airport's treatment of general aviation discriminates in favor of intrastate commerce, al-

tion in favor of general aviation.¹⁵ Moreover, regardless of its competitive impact the Airport's discrimination *does* harm the Airlines, because the funds that now subsidize general aviation could otherwise be used for the general benefit of all Airport users. See Airline Br. 38.

III. THE AIRPORT'S FEES VIOLATE THE COMMERCE CLAUSE

The Court of Appeals held that in enacting the AHTA, Congress thereby intended to foreclose any Commerce Clause challenges to any airport fees—whether or not those fees are regulated or addressed by the AHTA. As the Airlines have explained (Airline Br. 40-43), that holding is flatly contrary to this Court's precedents.

The Airport does not, and cannot, show that in enacting the AHTA Congress "expressly stated" its "unmistakably clear" intent to foreclose all Commerce Clause review, as is required under this Court's precedents. See *id.* Rather, Congress enacted the AHTA to *strengthen* the Commerce Clause's prohibitions, not negate them. Thus, even if Congress intended to wholly exclude concession fees from the scope of the AHTA (which the Airlines dispute), it could not have intended thereby to eliminate the pre-existing limitations imposed on those fees by the Commerce Clause. And Congress certainly did not make any such intent "unmistakably clear."

Apparently recognizing that the AHTA does not contain the required express preclusion of Commerce Clause review, the Airport and the Solicitor General contend

though relevant under the Commerce Clause, is not relevant under the AHTA. The Airlines submit that their separate discrimination claim under the Commerce Clause should be sustained on the current factual record. However, the District Court dismissed the claim summarily before trial, ruling that Congress had foreclosed any reliance on the Commerce Clause. Thus, if the Court reverses that ruling, the Airlines should have an opportunity to fully litigate that claim on the merits.

¹⁵ See Senate Report at 17, 1973 U.S.C.A.N. at 1446 (*Evansville* "does not provide adequate safeguards to prevent . . . discriminatory taxation"); Airline Br. 37 & n.47.

instead that the federal grant assurance provisions (enacted most recently in the AAIA) manifest Congress' intent to foreclose such review. See Airport Br. 29 & n.16; U.S. Br. 21-22. But they cite nothing in those provisions manifesting that intent. This Court, moreover, rejected this contention in *Evansville*, holding that the AAIA's predecessor did *not* evidence Congress' intent to "deny or pre-empt state and local power" to impose user fees, provided the fees complied with the Commerce Clause. *Evansville*, 405 U.S. at 721.¹⁶ Thus, just as the grant assurance statute did not preclude Commerce Clause review in *Evansville*, it does not do so here.

If the Court agrees with the Airlines that the Airport's fees are invalid under the AHTA, it need not reach the Commerce Clause claim. However, if the Court agrees instead with the Court of Appeals that the AHTA claim fails because concession fees may not be considered under that statute, it must then reach the constitutional claim. For the Airport does not—and cannot—dispute that concession fees *are* within the scope of the Commerce Clause. See Airline Br. 42. And, for the reasons earlier stated, when concession fees are taken into account the fees imposed on the Airlines plainly violate *Evansville's* Commerce Clause standards.

IV. THIS COURT SHOULD REVIEW THE LEGALITY OF THE AIRPORT'S FEES

The Airport and the Solicitor General devote most of their briefs to contending that the Airlines have no cause of action to challenge the Airport's fees. It is submitted that this question is not properly before the Court, that even if it were the Court should decline to address it, and that, in any event, the Airlines clearly were entitled to challenge the Airport's fees in federal court.

¹⁶ Moreover, this Court has indicated that such intent *cannot* be implied from a statute—like the AAIA—that simply provides "regulations governing the expenditure of federal funds." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) (explaining holding of *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983)).

A. The Private Right of Action Issue is Not Properly Before the Court

The Airlines have already explained in detail why the private right of action issue is not properly before the Court.¹⁷ Significantly, neither the Airport nor the Solicitor General has refuted the Airlines' contention that a cross-petition was jurisdictionally necessary to preserve that issue for review. Instead, they merely cite cases in which a respondent was permitted to defend a judgment on grounds that, if accepted, would *not* have expanded or modified the relief granted below.¹⁸

Moreover, the Solicitor General acknowledges that "the Court may of course decline to decide the issue and simply assume for purposes of this case that a cause of action exists." U.S. Br. 8 n.4. This is what the Court should do. For even if the Solicitor General prevailed on his view of the private right of action question, it is highly unlikely to affect the outcome of this case.

Thus, the Airport and the Solicitor General contend that this case—which has already received full consideration by the District Court and the Court of Appeals—must be sent back to the Secretary so that he might express his own views on the reasonableness of the Airport's fees. Thereafter, they contend that that legal determination would be subject, once again, to review by the Court of Appeals and then by this Court.

¹⁷ See Airline Br. 19-20 n.8; Petitioners' Opposition to Motion for Leave to Participate in Oral Argument. Although the Court has granted the United States' motion to participate in oral argument, it has not agreed to address the private right of action issue.

¹⁸ See Airport Br. 22 n.11 (citing *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) and *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)); U.S. Br. 8 n.4 (citing *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) and *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977)). In fact, the Solicitor General cites *Alexander v. Coaden Pipe Line Co.*, 290 U.S. 484 (1934), where the Court *refused* to allow the respondent to raise issues which were not presented in the petition for certiorari and upon which the petitioner had prevailed below. *Id.* at 487.

The Secretary, however, has already expressed his view that the decisions below "comport with this Court's prior decisions and are generally consistent with federal statutory law and policy." U.S. Br. 23. And the Solicitor General points to nothing in the Secretary's expertise that would assist in evaluating the legal questions now before the Court. Rather, the facts of this case are undisputed and all parties agree that the questions presented merely require application of the same three legal principles that this Court applied in *Evansville*. There is thus no reason to believe these proceedings would take a different course even if the Court were to hold that the AHTA affords no private right of action, and it would merely waste scarce judicial resources to require several more levels of repetitive litigation.¹⁹ The Court should thus address only the issues presented in the petition.

B. The Airlines Have a Cause of Action Under the Anti-Head Tax Act

The Court of Appeals held that the Airlines have a private right of action under the AHTA (J.A. 17-18), a conclusion that has been reached, explicitly or implicitly, by every other court to have addressed the statute²⁰—

¹⁹ Furthermore, as is explained below (*infra* at 18-20), if the Court elected to address whether the Airlines have a proper cause of action, it would need to address alternative bases for that action (the Supremacy Clause and Section 1983)—which provide the Airlines a cause of action even if the AHTA does not.

²⁰ See, e.g., *Interface Group*, 816 F.2d at 15-16 (explicitly finding private right of action); *Indianapolis*, 733 F.2d at 1265-66; *City and County of Denver*, 712 F. Supp. at 836-41; *Rocky Mountain Airways*, 674 F. Supp. at 314-16 (explicitly finding private right of action); *Niagara Frontier Transp. Auth. v. Eastern Airlines, Inc.*, 658 F. Supp. 247, 249-51 (W.D.N.Y. 1987) (same); *Island Aviation, Inc. v. Guam Airport Auth.*, 562 F. Supp. 951, 960 (D. Guam 1982); *United Air Lines, Inc. v. County of San Diego*, 2 Cal. Rptr. 2d 212, 219-21 (Cal. Ct. App. 1991); *City of College Park v. Atlantic Southeastern Airlines, Inc.*, 391 S.E.2d 460 (Ga. Ct. App. 1990); *State Bd. of Equalization v. American Airlines, Inc.*, 773 P.2d 1033 (Colo.), *cert. denied*, 493 U.S. 851 (1989); *Republic Airlines, Inc. v. Department of Treasury*, 427 N.W.2d 182, 185-87 (Mich. Ct. App. 1988); *Airborne Freight Corp. v.*

including this Court on three separate occasions.²¹ This unanimous conclusion is fully supported by the factors set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1975). However, the AHTA was enacted in 1973, two years before this Court sharply modified its approach in *Cort*. As was held in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court "consistently found implied remedies" before 1975, and evaluation of statutes enacted in this period must therefore take into account Congress' understanding of that "contemporary legal context." *Id.* at 698-99.

1. Under the first *Cort* factor, there can be no dispute—and the Solicitor General in fact concedes—that the AHTA was enacted for the "especial benefit" of the Airlines and their passengers. See U.S. Br. 11 ("Congress intended to benefit airline passengers—and incidentally, we may assume, commercial air carriers—by prohibiting head taxes and requiring user fees imposed on aircraft operators to be 'reasonable'"). Indeed, 49 U.S.C. App. § 1513(b) expressly allows only reasonable fees upon "aircraft operators."

2. The second *Cort* factor, legislative history, even more clearly evidences Congress' intent to afford private actions. Congress enacted the AHTA specifically to strengthen the limitations recognized in *Evansville*, which

New York State Dept. of Taxation and Fin., 527 N.Y.S.2d 107 (N.Y. App. Div. 1988); *Northwest Airlines, Inc. v. State*, 358 N.W.2d 515 (N.D. 1984); *State v. Cochise Airlines*, 626 P.2d 596 (Ariz. Ct. App. 1980); *Allegheny Airlines, Inc. v. City of Philadelphia*, 309 A.2d 157 (Pa. 1973).

²¹ See *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987); *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986); *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983). Recognizing that this Court has routinely reviewed challenges to State taxes under the AHTA, the Airport argues that Congress intended to allow a private right of action to challenge taxes but not fees. See Airport Br. 24 n.12. This is absurd. There is no evidence that Congress intended to treat the "taxes" and "head charges" listed in § 1513(a) any differently from the "fees" or "other charges" listed in that same provision.

had involved direct airline challenges to airport charges under the Commerce Clause. See Senate Report at 17, 1973 U.S.C.C.A.N. at 1446 (*Evansville* "does not provide adequate safeguards to prevent undue or discriminatory taxation"). It would completely nullify this intent to interpret the AHTA as denying airlines the private right of action that Congress believed had been *too weak* in *Evansville*.

Accordingly, where, as here, Congress enacts a statute against the backdrop of a pre-existing private right of action, it presumably intended the statute to be enforced in the same manner. See *Cannon*, 441 U.S. at 694-99. As one court has explained:

[T]he Anti-Head Tax Act was passed pursuant to Congress's powers under the Commerce Clause The airlines had standing to bring the [*Evansville*] action. The Senate report for the Anti-Head Tax Act cites the *Evansville* case as the impetus for the passage of the Act It seems unlikely, given all of the above, that Congress intended to revoke the airlines' standing to raise the proscriptions of the Commerce Clause, as codified in the Act.

Niagara Frontier, 658 F. Supp. at 251.

Moreover, after numerous decisions had either explicitly or implicitly allowed private rights of action under the AHTA (see *supra* nn. 20, 21), Congress twice amended the statute without expressing any disapproval of those decisions.²² This "is itself evidence that Congress affirmatively intended to preserve that remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982). Similarly, when Congress amended the AHTA in 1990 to permit "passenger facility charges," it expressly provided for administrative review and enforcement (49 U.S.C. App. § 1513(e)(11),

²² See Aviation Safety and Capacity Expansion Act of 1990, Pub. L. No. 101-508, tit. IX, §§ 9110, 9125, 104 Stat. 1388-357 (codified as amended at 49 U.S.C. App. § 1513(e), (f)); AAIA, Pub. L. No. 97-248, tit. V, § 532, 96 Stat. 701 (codified at 49 U.S.C. App. § 1513(d)).

(12)(C)), but specified no such limitations either for the pre-existing prohibitions in § 1513(a) or for a separate prohibition on State taxation that was newly-codified in § 1513(f). Thus, it cannot be presumed that Congress wished for the Secretary alone to police compliance with § 1513(a).²³

3. A private right of action is also "consistent with the underlying purposes of the legislative scheme." *Cort*, 422 U.S. at 78. The underlying purpose of the AHTA was to *strengthen* the right of action the Court had already recognized in *Evansville*. In arguing otherwise, the Airport and the Solicitor General rely almost exclusively on the fact that Congress located the AHTA in a newly-created "miscellaneous" subchapter of the Federal Aviation Act of 1958 ("FAA"). But the legislative history shows that this location had nothing to do with the enforcement procedures of the FAA, which had been enacted 15 years before. Rather, Congress had simply asked legislative counsel to determine whether the AHTA should be codified in the FAA or in the statutes that governed the airport trust fund.²⁴ Counsel responded that it would be preferable to locate the AHTA in the FAA "in view of the fact that the Federal Aviation Act of 1958 is the Act under which the Federal Government exercises its authority under the Commerce Clause of the Constitution to regulate air transportation" *Id.* If anything, this demonstrates Congress' intent that the AHTA be enforced in the *same* manner as the Commerce Clause. And it certainly does not indicate that Congress intended thereby to preclude the judicial enforcement this Court had permitted in *Evansville*.

²³ See *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citation omitted).

²⁴ See Senate Report at 25, 1973 U.S.C.C.A.N. at 1454 (referring to Airport and Airway Development Act and Airport and Airway Revenue Act).

Furthermore, relegating AHTA enforcement solely to the FAA's administrative procedures would also be inconsistent with Congress' intent to provide an *effective* prohibition on exactions that burden air commerce. The FAA's enforcement provision, 49 U.S.C. App. § 1487(a), allows only injunctive relief; thus, under that section a passenger or airline could not recover taxes or fees extracted by an airport in violation of the AHTA. By contrast, retrospective relief is available under the Commerce Clause, whose prohibitions Congress sought to strengthen. See *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).²⁵

Finally, the Airport and the Solicitor General assert that a private right of action under the AHTA would hamper the Secretary's parallel enforcement authority under the FAA and the AAIA, 49 U.S.C. App. § 2210(a)(1). See *Airport Br.* 25; *U.S. Br.* 18. This is simply not so. Unlike the AHTA, the AAIA applies

²⁵ The Solicitor General contends (see *U.S. Br.* 14) that because the general FAA enforcement provision, 49 U.S.C. App. § 1487(a), provides for a private right of action under a different provision of the FAA (§ 1371(a)), and because Congress did not amend § 1487(a) to specify the AHTA as well, Congress must have intended to exclude a private right of action under the AHTA. In fact, however, both when Congress enacted and amended the AHTA, courts had found numerous private rights of action under various provisions of the FAA (in addition to the AHTA itself). See, e.g., *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566, 568-70 (8th Cir. 1989) (§ 1374(c)); *Bratton v. Shiffrin*, 635 F.2d 1228 (7th Cir. 1980), *cert. denied*, 449 U.S. 1123 (1981) (§ 1371(n)(2)); *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 537 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976) (§ 1374(b)); *Archibald v. Pan American Airways, Inc.*, 460 F.2d 14, 16 (9th Cir. 1972) (same); *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956) (prior codification of § 1374(b)); *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972) (safety requirements); *Mortimer v. Delta Air Lines*, 302 F. Supp. 276 (N.D. Ill. 1969) (§ 1374(b)); *Town of East Haven v. Eastern Airlines, Inc.*, 282 F. Supp. 507, 513 (D. Conn. 1968) (safety requirements). This belies the contention that Congress intended for § 1487(a) to be the exclusive enforcement mechanism for each and every provision of the FAA.

only to airports receiving federal funds and its remedies are limited to withholding those funds. *See* 49 U.S.C. App. § 2218(b) (1988). As this Court has explained, such federal funding provisions are no substitute for private actions. *See Cannon*, 441 U.S. at 704-06. This is especially so given that Congress enacted the AHTA in response to this Court's holding that the precursor to the AAIA was *not* a sufficient prohibition on airports. *See Evansville*, 405 U.S. at 721. In addition, denying private actions would not foster more "uniformity" in the interpretation of the AHTA. *See* U.S. Br. 18. Under the FAA, review of the Secretary's decisions is available in each circuit court (*see* 49 U.S.C. App. 1486(a)); thus, the circuit split that now exists would continue even if enforcement of the AHTA were relegated solely to the FAA. In fact, the only way to achieve uniformity is for this Court to resolve the current conflict now.²⁶

For all these reasons, the Court of Appeals correctly held that the Airlines have a private right of action under the AHTA.²⁷

C. The Airlines Have a Cause of Action Under the Supremacy Clause and 42 U.S.C. § 1983

Regardless whether the AHTA affords a private right of action, the Airlines have a cause of action to challenge the Airport's fees for at least two other reasons.

First, the Airlines were entitled to bring an action under the Supremacy Clause to invalidate the Airport's fees on federal preemption grounds. The AHTA is simply an express preemption provision directed at States and their

²⁶ Moreover, the Secretary historically has expressed little interest in the reasonableness of airport fees. Indeed, the Solicitor General identifies only a single case where the Secretary has considered an AHTA claim, *see New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989), and that claim was merely an adjunct to claims under the AAIA.

²⁷ The fourth *Cort* factor—whether the issue should be left to state law—is plainly not implicated here.

political subdivisions. Accordingly, the Airlines have properly sought an injunction against respondents (who are public entities) on the grounds that their fee ordinance is preempted by the AHTA. As this Court has held, federal courts always have the authority to hear preemption challenges under the Supremacy Clause.²⁸ And as the Solicitor General notes, the Court has already decided three cases "raising preemption claims under the AHTA." U.S. Br. 10-11 n.5 (citing cases).

Second, the Airlines were in any event entitled to bring an action under 42 U.S.C. § 1983 for the Airport's violation of the AHTA.²⁹ Section 1983 provides a cause of action against state instrumentalities for their violation of federal statutes irrespective of whether those statutes also directly afford a private right of action. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508-09 n.9 (1990). Unless Congress has expressly stated otherwise, § 1983 provides a cause of action for violation of a federal statute if the statute (1) "was intend[ed] to benefit the putative plaintiff"; (2) is a "binding obligation on the governmental unit"; and (3) is not "beyond the competence of the judiciary to enforce." *Id.* at 509 (citations omitted).

Here, Congress has not expressly foreclosed § 1983 suits for violation of the AHTA. It is also indisputable that the AHTA was intended to benefit the Airlines, and is binding upon states and localities. Finally, there is no question that the AHTA is within the competence of the judiciary to enforce. Indeed, in *Evansville* this Court

²⁸ *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). *Accord, Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 259 n.6 (1985). *See also Western Air Lines, Inc. v. Port Auth.*, 817 F.2d 222, 225-26 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (even when aviation statute affords no private right of action, airline may sue under Supremacy Clause to challenge local regulation that violates statute).

²⁹ This Court may consider this argument even though the Airlines did not present it below. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981).

had no difficulty applying the same factors that all parties have agreed should be applied under the AHTA.³⁰

Therefore, even if the Court reaches the cause of action issue in this case it should conclude that the Airlines were entitled to bring this suit.

CONCLUSION

For the foregoing reasons, and those presented in petitioners' opening brief, the judgment of the Court of Appeals should be reversed and the case remanded for consideration of petitioners' damages and other appropriate relief.

Respectfully submitted,

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³⁰ See also *Wilder*, 496 U.S. at 519 (that a statute "gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the [statute], but it does not render the [statute] unenforceable by a court").

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No. 92-97

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., ET AL., PETITIONERS

v.

COUNTY OF KENT, MICHIGAN, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING RESPONDENTS**

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QUESTIONS PRESENTED

1. Whether there is an implied private right of action under the Anti-Head Tax Act, 49 U.S.C. App. 1513(b), or a right of action under the Commerce Clause, that would allow airlines to proceed directly in federal court to challenge the reasonableness of airport user fees.

2. If any such right exists, whether the user fees charged to petitioners are reasonable under federal law.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-97

NORTHWEST AIRLINES, INC., ET AL., PETITIONERS

v.

COUNTY OF KENT, MICHIGAN, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Secretary of Transportation has primary responsibility for the administration and enforcement of federal laws relating to the Nation's airways and airports, including the Federal Aviation Act of 1958, 49 U.S.C. App. 1301 *et seq.*, the Anti-Head Tax Act, 49 U.S.C. App. 1513, and the Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2201 *et seq.* In administering the comprehensive federal regulatory scheme in this area, the United States has an important interest in ensuring that national standards are developed and applied clearly, uniformly, and in a manner consistent with overall federal policy. In addition, the United States has an interest in the proper development of the law concerning implication of private rights of action under federal statutes, to ensure that such rights will be found only where consistent with

congressional intent and after taking proper account of administrative considerations. The United States filed a brief at the petition stage at the invitation of the Court.

STATEMENT

Petitioners are seven airline carriers that brought suit in federal district court claiming that respondent Kent County International Airport charges unreasonable and discriminatory user fees in violation of federal aviation laws, in particular the Anti-Head Tax Act, 49 U.S.C. App. 1513(b).¹ Petitioners also argue that the user fees violate the Commerce Clause of the Constitution. The court of appeals rejected both claims.

1. Congress has enacted a comprehensive scheme of federal regulation and oversight of the Nation's airways and airports. The Federal Aviation Act of 1958 (FAA) generally preempts state regulation of air carrier "rates, routes, or services," while preserving the authority of States and political subdivisions to exercise "proprietary powers and rights" as airport owners and operators. 49 U.S.C. App. 1305(a)(1) and (b)(1). One Section of the FAA, known as the Anti-Head Tax Act (AHTA), prohibits state and local governments from imposing direct or indirect taxes on "persons traveling in air commerce."² 49 U.S.C. App. 1513(a) (Supp. III 1991). The AHTA excludes from its prohibition, however, "reasonable rental charges, landing fees, and other service charges [collected]

¹ Pertinent provisions of Section 1513 and of certain other statutes discussed below are set forth in the Appendix to this brief.

² The AHTA was enacted in response to this Court's decision in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which sustained a \$1 service fee imposed on each commercial airline passenger flying out of the airport. See S. Rep. No. 12, 93d Cong., 1st Sess. 17 (1973).

from aircraft operators for the use of airport facilities." 49 U.S.C. App. 1513(b). The Secretary of Transportation is authorized to carry out the provisions of the FAA by, *inter alia*, investigating complaints of violations of the Act, conducting administrative proceedings, issuing remedial orders, and bringing enforcement actions in federal district court. See 49 U.S.C. App. 1354(a), 1482(a), 1487(a) (see App., *infra*, 6a-9a); see also 14 C.F.R. Pt. 13.

The Airport and Airway Improvement Act of 1982 (AAIA) complements the FAA and AHTA. The AAIA requires the Secretary to formulate a national airport system plan, one purpose of which is to ascertain airport development needs. 49 U.S.C. App. 2203 (1988 & Supp. III 1991). The statute also provides federal funds for airport development through a federal Airport and Airway Trust Fund and other sources. 49 U.S.C. App. 2204 (1988 & Supp. III 1991); 26 U.S.C. 4261, 9502. The Secretary may approve an application seeking a grant of federal funds for an airport development project only if the airport provides specified written "assurances," including that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and that "each air carrier * * * shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation * * * as are applicable to all such air carriers which make similar use of such airport." 49 U.S.C. App. 2210(a)(1) (see App., *infra*, 4a-5a). The owner or operator must also promise to "maintain a fee and rental structure * * * which will make the airport as self-sustaining as possible," and to use "all revenues generated by the airport * * * for [its] capital or operating costs."³ 49 U.S.C. App. 2210(a)(9) and (12).

³ The AAIA authorizes the Secretary to prescribe requirements and conduct investigations to ensure compliance with the assurances pro-

2. Respondents charge petitioners landing and aircraft parking fees for their runway use, rent for the terminal space they occupy, 100% of respondents' cost of providing "crash, fire, and rescue" (CFR) services, and amortization fees for assets acquired by the airport. Pet. App. 28a; *id.* at 14a-15a. Respondents also charge general aviation (corporate and private aircraft) a "fuel flowage fee," and charge concessions (restaurants, parking lots, etc.) a percentage of their gross receipts. *Id.* at 25a, 29a. The revenues generated from the concessions substantially exceed the concessions' allocated costs, and thus yield a sizable surplus. The surplus is used to offset shortfalls occurring in other areas or placed in the airport's reserve fund. *Id.* at 9a, 29a.

Petitioners filed suit in the district court seeking a declaratory judgment that the landing fees, terminal rental rates, and other charges assessed by respondents as of April 1988 were unreasonable and thus unlawful under the AHTA and the AAIA, and that they imposed an undue burden on interstate commerce in violation of the Commerce Clause. Pet. App. 24a, 47a-48a. Petitioners contended that respondents' rate methodology resulted in unreasonable rates and profits that greatly exceeded the airport's costs. Petitioners also argued that surplus revenues generated from the fees paid by concessions should be "cross-credited" to petitioners so as to reduce the latter's fees. Finally, petitioners claimed that respondents undercharged noncommercial aviation users in several respects, thereby discriminating in favor of primarily local traffic. *Id.* at 30a.

3. The district court first held that petitioners had no implied right of action to challenge respondents' user fees

vided by airport project sponsors. 49 U.S.C. App. 2210(b), 2218(a). The Secretary's regulations in 14 C.F.R. Pt. 13 governing administrative proceedings under the FAA also apply to investigations and enforcement actions under the AAIA.

under the AAIA, but did have such a right under the AHTA. Pet. App. 44a-46a. On the merits, the district court concluded that respondents' fees were reasonable under the AHTA. The court held that because the AHTA refers only to fees charged to "aircraft operators," it does not require cross-crediting of surpluses generated by concession fees in order to lessen the fees charged to petitioners. *Id.* at 32a, 36a. Reviewing those fees, the court found all but one (for aircraft parking) to be reasonable relative to the benefits conferred on petitioners. *Id.* at 37a-38a. It also rejected petitioners' claim that respondents' fee structure discriminated in favor of general aviation (*id.* at 38a), and held that in light of the congressional action represented by the AHTA, petitioners' fees were not subject to scrutiny under the dormant Commerce Clause (*id.* at 46a).

4. The court of appeals affirmed most of the district court's judgment, reversing and remanding (over one dissent) only for the proper allocation of CFR costs between petitioners and general aviation. Pet. App. 17a, 20a. The court first agreed with the district court that petitioners could assert an implied private right of action under the AHTA. *Id.* at 4a-5a. In addressing the reasonableness of respondents' fees under that statute, the court found that non-airline concessions are not within the scope of the statute (*id.* at 9a), and thus concluded that the surplus revenue generated by concession fees need not be cross-credited to reduce petitioners' charges. *Id.* at 10a. The court also determined that petitioners were allocated and charged their fair share of the airport's costs in connection with terminal and other public spaces, and that the amortization fees charged for the airport's capital assets were reasonable. *Id.* at 11a-12a, 14a-15a.

In addition, the court found no basis in the AHTA for altering the allocation of costs to general aviation, agree-

ing with the district court that respondents' policy of charging petitioners 100% of certain allocated costs but assessing general aviation users only 20% of their corresponding costs did not render petitioners' fees "unreasonable" under the AHTA because petitioners were not required to make up the difference. Pet. App. 17a-20a. Finally, the court of appeals declined to conduct an independent analysis of the challenged user fees under the Commerce Clause, again agreeing with the district court that in enacting the AHTA Congress had "established clear guidelines for the fees and rates" that airports charge, thus foreclosing review except for compliance with those federal guidelines. *Id.* at 16a-17a.

SUMMARY OF ARGUMENT

1. There is no private right of action under the AHTA allowing petitioners to challenge the reasonableness of respondents' airport user fees. Nothing in the language, structure, or legislative history of the AHTA or related statutes permits the inference that Congress intended to create a remedy for unreasonable airport fees enforceable in the first instance by private actions in the federal courts. Instead, such complaints under the AHTA must be pursued initially in administrative proceedings before the Secretary, subject to judicial review in the courts of appeals. Moreover, as petitioners concede, the AHTA must be read in conjunction with the AAIA, which clearly commits to the Secretary the review of rate reasonableness and related questions. Finally, providing for initial determination of such questions by the Secretary is appropriate in light of the Secretary's expertise, regulatory authority and national policy perspective, and comports with traditional conceptions of the relative institutional roles of administrative agencies and the federal courts.

2. Similarly, because Congress has legislated on the specific subject of state airport user fees, in the context of a comprehensive federal scheme of airport and airway regulation, and has provided a federal administrative forum for the resolution of rate reasonableness issues arising under that scheme, judicial review of such fees under the dormant Commerce Clause is both unnecessary and inappropriate.

3. Because the Secretary has not had an opportunity to evaluate the parties' substantive positions in the course of an appropriate administrative proceeding, we express no definitive opinion on the merits of petitioners' claims. From a general review of the opinions and record in this case, however, it would appear that the lower courts' decisions on the merits comport with this Court's prior decisions and are generally consistent with federal statutory law and policy. Neither statutory law nor this Court's decisions require any particular fee structure or methodology, and the fees charged petitioners would generally be considered reasonable under federal law so long as they are not substantially higher either than respondents' own properly allocated costs or than the fees charged to other commercial carriers making similar use of the airport. On the basis of the record in this case, and without prejudging the outcome of any later proceeding before the Secretary, petitioners do not appear to have demonstrated that respondents' fees are unreasonable, or that they have been subject to unjust discrimination under the applicable federal law.

ARGUMENT

I. THE AHTA CREATES NO PRIVATE RIGHT TO CHALLENGE AN AIRPORT'S USER FEES DIRECTLY IN FEDERAL COURT

The threshold issue presented by this case is who should address, in the first instance, petitioners' complaints about

respondents' user fees: the courts or the Secretary.⁴ Both

⁴ Petitioners assert in their brief (Br. 19 n.18) that the private right of action issue is not properly before this Court; in their opposition to the government's motion for leave to participate in oral argument they contend (Opp. 4-5 & n.5) that the Court even lacks jurisdiction to address the issue, because respondents did not file a cross-petition for certiorari and a decision on the right-of-action ground would necessarily modify the judgment below in respondents' favor. We have responded to these arguments at some length in our reply to petitioners' opposition to our motion. It suffices to note here that while the Court may of course decline to decide the issue, and simply assume for purposes of this case that a cause of action exists (see *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 523 & n.3 (1991); *Kamen v. Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1716 n.4 (1991)), there is no limitation on the Court's power that would prevent it from deciding the question in this case. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 6.35, at 384-387 (6th ed. 1986). Indeed, as recently reaffirmed in *United States Nat'l Bank v. Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2178 (1993), "a court may always consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." Cf. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 n.12 (1981) (grant of certiorari on certain issues poses no jurisdictional bar to consideration of other questions "necessary for the proper disposition of the case"); *United States v. Western Pac. R.R.*, 352 U.S. 59, 62-63 (1956) (issue of primary administrative jurisdiction not raised in parties' filings with the Court). Whether the AHTA authorizes private actions to challenge airport fees, without prior resort to the Secretary of Transportation, is surely such an antecedent and dispositive issue.

Moreover, affirmance by this Court on the ground that there is no private right of action would not modify the judgment below. The part of that judgment adverse to respondents (directing a reallocation of CFR costs) has become final, and this Court's decision will not alter that result, even if it undercuts the basis on which the decision below was reached. See *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484, 487-488 (1934). In this Court respondents argue only for affirmance, on any ground, of that part of the judgment below that ran in their favor and that petitioners have brought before this Court for review. See *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977).

the district court and the court of appeals ruled that although petitioners had no private right of action under the AAIA, they could maintain their suit under the AHTA. Pet. App. 42a-46a; *id.* at 4a-6a. The latter decision is incorrect.

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), this Court identified four factors bearing on whether the courts will recognize a private right of action to enforce a federal statute: whether the statute creates a federal right in favor of the plaintiff; whether there is any explicit or implicit indication of congressional intent on the subject; whether recognition of a private right would be consistent with the overall statutory scheme; and whether the action would more appropriately be left to state law. Since *Cort*, the Court has explained repeatedly that "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action," and that the first three factors identified in *Cort*—"the language and focus of the statute, its legislative history, and its purpose"—are useful primarily in pursuing that inquiry. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576 (1979); see also, e.g., *Suter v. Artist M.*, 112 S. Ct. 1360, 1370 (1992).

Determining congressional intent "is basically a matter of statutory construction," *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979), requiring consideration of the language, structure, and legislative history of the statute, and especially of its enforcement and remedial provisions. *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 536 (1989); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). Unless the plaintiff can demonstrate that Congress's intent to create a cause of action "can be inferred from the language of the statute, the statutory structure, or some other source, the essential

predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981); *Artist M.*, 112 S. Ct. at 1370.

The FAA, of which the AHTA is a part, and the AAIA establish a comprehensive and reticulated scheme of federal regulation of the Nation's airways and airports in general, and of airport user fees in particular. The language, structure and history of the relevant statutes provide no basis for inferring a congressional intent to allow private parties to enforce the AHTA's reasonableness provision directly in the courts. The legislative intention reflected in the statutory scheme is rather that complaints about a federally funded airport's user fees should be raised before and resolved in the first instance by the Secretary.⁵

⁵ A few other decisions have concluded (or assumed) that airlines have a private right of action under the AHTA. See *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 15-16 (1st Cir. 1987); *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262, 1265-1266 (7th Cir. 1984) (addressing the AHTA issue without analysis of implied-right issue); *City & County of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834 (D. Colo. 1989) (implied right assumed without discussion); *Rocky Mountain Airways, Inc. v. County of Pitkin*, 674 F. Supp. 312, 314-316 (D. Colo. 1987); *Niagara Frontier Transp. Auth. v. Eastern Airlines, Inc.*, 658 F. Supp. 247, 249-251 (W.D.N.Y. 1987); *Island Aviation, Inc. v. Guam Airport Auth.*, 562 F. Supp. 951, 960 (D. Guam 1982); *American Airlines, Inc. v. City of Philadelphia*, 414 F. Supp. 1226 (E.D. Pa. 1976). In our view, those decisions mistakenly failed to appreciate the administrative remedy that Congress provided. See Note, *Airline Deregulation and Airport Regulation*, 93 Yale L.J. 319, 324 n.33 (1983) (suggesting appropriateness of regulatory review).

— This Court has never addressed the issue. Although the Court has decided cases raising preemption claims under the AHTA, none of those cases involved a request for federal court adjudication of the reasonableness of fees under 49 U.S.C. App. 1513(b), and none dis-

A. The pertinent language of the AHTA contains no reference to any enforcement mechanism, either in the courts or by the Secretary. It simply prohibits direct or indirect head taxes, and provides that state-owned or operated airports are not barred from collecting "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. 1513(a) (Supp. III 1991), (b). The court of appeals inferred, from the absence of any mention of the Secretary or an administrative enforcement scheme in Section 1513(a) or (b) itself, a congressional intent to allow a private cause of action directly in the courts. Pet. App. 5a. "But implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross*, 442 U.S. at 571.

Indeed, the most that can be said on the basis of this statutory language is that Congress intended to benefit airline passengers—and incidentally, we may assume, commercial air carriers—by prohibiting head taxes and requiring user fees imposed on aircraft operators to be "reasonable." See *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 16 (1st Cir. 1987). That conclusion alone implies nothing, however, about how Congress intended the prohibition to be implemented, and in particular about what role it intended the courts to play. See *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2763-2764 (1991). The statutory language is simply inconclusive on the remedial issue.

cussed whether an implied private right of action existed. See *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987) (ruling on lawfulness of state tax under 49 U.S.C. App. 1513(d)); *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986) (preemption claim with respect to aviation fuel tax imposed on foreign air carrier); *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983) (preemption challenge under 49 U.S.C. App. 1513(a) to tax on airline's gross revenues).

B. The overall legislative structure cuts against the conclusion that Congress intended courts to determine, in the first instance, the statutory reasonableness of airline user fees. Congress added the AHTA to an existing statutory framework that already provided for administrative review of asserted violations. Moreover, the explicit remedial sections of the statute clearly indicate that almost all private claims, including those under the AHTA, are to be pursued initially through the administrative process. Finally, when Congress amended the AHTA recently to permit limited per passenger charges under certain circumstances, it explicitly committed oversight of the amount and use of those charges to the Secretary.

1. The AHTA was enacted as part of the Airport Development Acceleration Act of 1973 (ADAA), which added to the FAA a new Section 1113, now codified at 49 U.S.C. App. 1513(a)-(c). Pub. L. No. 93-44, § 7(a), 87 Stat. 90. The new state tax prohibition was deliberately incorporated into the FAA in order to take advantage of the existing statutory and administrative structure. As the Senate Legislative Counsel explained, amending the FAA, "under which the Federal Government exercises its authority * * * to regulate air transportation," was "the most appropriate method of exercising the authority to pre-empt State and local taxation of passengers engaged in air transportation in the interests of the needs and proper regulation of such transportation." S. Rep. No. 12, 93d Cong., 1st Sess. 25 (1973).

At the time the AHTA was enacted, the FAA authorized the Federal Aviation Administrator to conduct investigations, issue orders, and promulgate regulations necessary to carry out the provisions of that statute. 49 U.S.C. 1354 (1970). It also provided that any person could file a complaint with the Administrator "with respect to anything done or omitted to be done by any person in

contravention of any provisions of [the FAA], or of any requirement established pursuant thereto," subject to judicial review of any resulting order in the courts of appeals. 49 U.S.C. 1482(a), 1486(a) (1970). Virtually identical provisions exist within the FAA today. See 49 U.S.C. App. 1354(a), 1482(a), 1486(a) (reproduced at App., *infra*, 6a-7a).

The Secretary has promulgated regulations that establish procedures for adjudicating complaints of violations of the FAA, including the AHTA. 14 C.F.R. Pt. 13. Any person may file a complaint with the Administrator with respect to any matter allegedly done or not done in violation of the FAA. After receiving an answer to the complaint, the Administrator determines if an investigation or hearing into the matter is warranted. 14 C.F.R. 13.5; see also 14 C.F.R. 13.20. Any such hearing is conducted in accordance with rules typically followed in administrative proceedings.⁶ See 14 C.F.R. 13.31-13.63. The Secretary has also established substantive guidelines and policies for determining whether airport user fees are in compliance with federal aviation laws. See pp. 25, 27, *infra*.

Thus, in 1973, Congress carefully added its new anti-head tax provisions to a long-established statutory structure that provided explicitly for administrative review of alleged violations—subject, of course, to judicial review of the administrative proceedings. 49 U.S.C. 1486(a) (1970); see 49 U.S.C. App. 1486(a). It seems highly un-

⁶ Although rarely invoked, these procedures governed, for example, the administrative review of an AHTA-based challenge to landing fees at Boston's Logan International Airport. See *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 160 (1st Cir. 1989) (*Massport*) (noting the Secretary's institution of a proceeding to consider, *inter alia*, "whether the [airport's] new landing fee structure violates the Anti-Head Tax Act"). The Secretary ultimately concluded that the fees in question did not constitute head taxes. *Id.* at 170.

likely that in doing so it intended to create an anomalous right of immediate access to the district courts for factual development and legal determination of rate reasonableness issues that are within the unique competence of the agency otherwise charged with administering the existing statute—or that, if it intended such a counterintuitive result, it would have passed over the matter in statutory silence. See *Karahalios*, 489 U.S. at 532-533; *Middlesex*, 453 U.S. at 14-15; *Transamerica*, 444 U.S. at 19-20.

2. The explicit remedial provisions of the FAA further demonstrate that Congress intended no private right of action under the AHTA. Section 1007(a) of the Act, 49 U.S.C. App. 1487(a) (formerly 49 U.S.C. 1487(a) (1970)), generally empowers only the Secretary or the Attorney General to bring enforcement actions in a district court. The same Section authorizes “any party in interest” to seek direct judicial enforcement only in the case of Section 1371(a), relating to certificates of public convenience and necessity; in all other cases, the only provision for private action is the administrative procedure discussed above. Thus, the statute in the main denies private parties the right that petitioners assert here; and “when Congress wished to provide a private * * * remedy, it knew how to do so and did so expressly.” *Touche Ross*, 442 U.S. at 572. See 49 U.S.C. App. 1482. In the face of such structural evidence of congressional intent to limit private judicial remedies, courts should not easily be persuaded to find such remedies by implication where Congress has not explicitly provided them.⁷

⁷ Similarly, in 1982, Congress added to the AHTA itself a provision prohibiting certain state taxes on “air carrier transportation property” that Congress has determined “unreasonably burden and discriminate against interstate commerce.” 49 U.S.C. App. 1513(d)(1). Section 1513(d)(1) was patterned on similar provisions in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub.

3. Finally, in 1990, Congress amended the AHTA to permit imposition, under certain circumstances, of limited per capita “passenger facility charges” (PFCs) that would otherwise be prohibited head taxes. 49 U.S.C. App. 1513(e) (Supp. III 1991). PFCs must be approved by the Secretary, and used to finance eligible airport-related projects also subject to approval by the Secretary under specified federal policy criteria. *Ibid.* Air carriers are given the opportunity to participate in the approval process under regulations to be promulgated by the Secretary. 49 U.S.C. App. 1513(e)(11)(C) and (D) (Supp. III 1991). And if the Secretary determines that a PFC previously approved is excessive or that PFC revenues are not being used as the statute requires, the Secretary is authorized to deduct such amounts from federal funding otherwise payable to the airport under the AAIA. 49 U.S.C. App. 1513(e)(12)(C) (Supp. III 1991).

We agree with petitioners (Br. 15) that the enactment of Section 1513(e) “confirms Congress’ continuing intention” to control airport user charges and “ensure that those charges are reasonable and are imposed and used only for necessary airport improvements.” But that Section also explicitly confirms Congress’s reliance *on the Secretary* to

L. No. 94-210, § 306, 90 Stat. 54, and the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31(a)(1), 94 Stat. 823 (codified at 49 U.S.C. 11503(b) and 11503a(b)). See *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987). The 4R Act and Motor Carrier Act provisions explicitly provide private rights of action to redress violations in federal district court. 49 U.S.C. 11503(e), 11503a(e). When Congress borrowed the anti-discrimination language of those laws for use in the AHTA, however, it left out the private remedy provision. That decision is not, of course, dispositive of congressional intent almost a decade earlier, when Section 1513(b) was enacted. But the obviously conscious congressional decision to exclude private judicial actions under Section 1513(d) suggests a similar legislative choice with respect to the earlier subsection.

evaluate the need for and reasonableness of airport user fees, in the context of an exception to the AHTA's general prohibition on per passenger charges. Precisely the same expertise and administrative capability are involved in the cost allocation and rate reasonableness determinations sought by petitioners in this case. Thus, when Congress had occasion to prescribe explicitly how such issues should be resolved, it committed them to the Secretary. That prescription confirms the decision implicit in the placement of the AHTA within the FAA structure, and argues strongly against the recognition of an inconsistent role for the district courts as factfinders and ratemakers under the closely related provisions of the same statute that are at issue in this case.

C. The legislative history of the AHTA is equally barren of support for the notion that Congress intended private parties to pursue statutory grievances through the courts, rather than through the administrative process. The committee reports contain no discussion regarding any enforcement mechanism, let alone a private right of action. S. Rep. No. 12, *supra*, at 17-26; H.R. Rep. No. 157, 93d Cong., 1st Sess. 2-3, 4-5, 10 (1973); H.R. Conf. Rep. No. 225, 93d Cong., 1st Sess. 5-6 (1973). See *Touche Ross*, 442 U.S. at 571. What the legislative history does reflect is Congress's intent to establish "a uniform national program of taxation and funding for airport improvements," which had already begun under the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, Tit. I, 84 Stat. 219 (formerly codified at 49 U.S.C. 1701 *et seq.* (1970)), the predecessor to the AAIA. S. Rep. No. 12, *supra*, at 21. Indeed, the Senate Report stresses the role of the federal government as a major participant in airport development and financing. *Id.* at 25-26; see also Pet. Br. 10. Given the important and coordinating role that Congress obviously envisioned for the Secretary with respect

to such issues, a concomitant intent to allow private parties to ignore the Secretary's centralized expertise and take quintessentially administrative questions directly to federal district courts throughout the country seems implausible at best.

D. In addition, a private right of action to challenge the reasonableness of airport user fees would be incompatible with the AHTA's companion provisions in the AAIA, 49 U.S.C. App. 2201 *et seq.* The Department of Transportation advises us that virtually all of the Nation's airports serving commercial airlines have development projects funded at least in part under the AAIA, and therefore subject to the requirements described below. As petitioners concede (Br. 14, 29 n.33, 31), the two statutes must be read in conjunction.

The AAIA establishes a major direct role for the Secretary in the development and financing of the Nation's airports, and contains its own administrative and judicial review procedures. The Secretary approves federal funding for local airport projects only when their sponsors provide assurances that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and that the rent and other fees charged to "air carriers" will be "nondiscriminatory." 49 U.S.C. App. 2210(a)(1) (see App., *infra*, 4a-5a). In addition, the fee structure must make the airport as self-sustaining as possible, and all revenues (from both carriers and airport concessions) must be used for the airport's capital or operating costs. 49 U.S.C. App. 2210(a)(9) and (12). If a project sponsor violates an assurance, the Secretary may investigate the matter at a hearing and, if warranted, withhold funding. 49 U.S.C. App. 2218(a), (b)(1). The same regulations that govern administrative proceedings under the FAA apply to such AAIA hearings. See 14 C.F.R. 13.3, 13.20, 13.31-13.63. A project sponsor may seek

appellate judicial review of a decision by the Secretary to withhold funding.⁸ 49 U.S.C. App. 2218(b)(4).

Thus, under the AAIA, the Secretary is authorized to assess whether an airport's user fees are reasonable, not unjustly discriminatory, and put to proper purposes. Creating still another right of action under the AHTA for airlines to challenge the same fees directly in the district courts therefore would undermine the Secretary's role under the AAIA, and create confusion and the potential for a variety of conflicting decisions, often rendered without the benefit of the Secretary's unique perspective and expertise. See, e.g., *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 158-159 (1st Cir. 1989) (*Massport*) (discussing confusion caused by parallel judicial and administrative proceedings). Requiring that complaints be presented to the Secretary in the first instance largely eliminates such concerns, and ensures the uniformity in oversight of the Nation's airports and airways that Congress intended.⁹

Finally, in providing for initial determination of the reasonableness of airport fees by the Secretary, the statutory scheme is in keeping with the usual concepts of the

⁸ The courts have uniformly held that there is no private right of action under the AAIA. See, e.g., *Massport*, 883 F.2d at 168-169; *Western Air Lines, Inc. v. Port Auth.*, 817 F.2d 222, 225 & n.4 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988); *Arrow Airways, Inc. v. Dade County*, 749 F.2d 1489, 1491 (11th Cir. 1985). The court of appeals here reached the same conclusion, Pet. App. 5a-6a, and petitioners have not sought review of that holding.

⁹ Congress confirmed in connection with the *Massport* case that it expects the Secretary to rule on the lawfulness of airport fee structures. The Department of Transportation and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-457, 102 Stat. 2125 (1988), explicitly acknowledged the Secretary's role in determining whether an airport's landing fee structure is consistent with both the FAA and the AAIA, and established a date by which the Secretary was to issue a decision in *Massport*. 102 Stat. 2130-2131.

relative institutional roles of administrative agencies and the courts. The Secretary is better placed to evaluate the appropriateness of particular fees in light of both local conditions and national policy, and has a broader ability than would a court to regulate fees deemed unreasonable or unjustly discriminatory. See *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262, 1270 (7th Cir. 1984). Moreover, because of his authority to withhold federal funds, the Secretary has significant leverage over airports under the AAIA—in addition to the enforcement authority provided under the AHTA—to achieve the establishment of reasonable rental charges and other fees.¹⁰

II. THE COURT OF APPEALS PROPERLY DECLINED TO REVIEW THE AIRPORT'S USER FEE STRUCTURE UNDER THE COMMERCE CLAUSE

Petitioners contend that the airport's user fees violate the "dormant" Commerce Clause, and that the court of appeals erred in declining to review respondents' fee structure on that basis. Because Congress has legislated on the specific subject of state airport user fees, in the context of a comprehensive federal scheme of airport and airway regulation, and has provided a federal administrative forum for the resolution of rate reasonableness issues arising

¹⁰ The considerations of administrative efficiency and expertise supporting the conclusion that Congress intended to commit initial rate reasonableness determinations to the Secretary are analogous to those taken into account by this Court in *Cort v. Ash*, *supra*, when it recognized that matters of corporation law are "traditionally relegated to state law, in an area basically the concern of the States." 422 U.S. at 78; see *id.* at 84-85. Rate reasonableness determinations of the sort at issue here are well suited, and typically committed, to expert administrative determination; it is correspondingly less appropriate to divert such issues from one administrative to many judicial forums in the absence of compelling evidence of congressional intent.

ing under that scheme, petitioners' claim is without merit. See also *Massport*, 883 F.2d at 174, 176; *Indianapolis*, 733 F.2d at 1266.

In *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946), the Court held that, when Congress has exercised its power under the Commerce Clause, a court is "not required to determine whether [a state] tax would be valid in the dormancy of Congress' power. For Congress has expressly stated its intent and policy in the Act." The Court reaffirmed that principle in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982):

Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.

More recently, the Court has emphasized that "congressional authorization of otherwise impermissible state interference with interstate commerce" must be "expressly stated" or otherwise "unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 90-92 (1984); see also, e.g., *Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992).

Petitioners contend (Br. 41) that Congress expressed no such unmistakable intent in the AHTA. That statute, however expressly contemplates the imposition of airport user fees on "aircraft operators" so long as they are "reasonable," 49 U.S.C. App. 1513(b); and the FAA, of which the AHTA is a part, provides explicitly for administrative (and, ultimately, judicial) review of fees that an aggrieved party claims violate that federal statutory standard.

49 U.S.C. App. 1482, 1486. Moreover, although the court of appeals correctly concluded that concession fees, which are not imposed on "aircraft operators," are not covered by the terms of the AHTA, Congress has unambiguously addressed the subject of such fees and rentals in the AAIA (see 49 U.S.C. App. 2210(a)(1), (9) and (12)), which petitioners agree (Br. 29 n.33) is "intimately connected" to, and must be read in conjunction with, the AHTA.¹¹ The comprehensive scheme of federal administrative regulation and oversight of local airport user fees set forth in these provisions leaves no doubt that Congress has affirmatively acted and "struck the balance it deems appropriate" in this area — not, to be sure, as to the details of any particular local tax or fee, but as to the standards to be applied in evaluating such exactions, and as to the forum in which they are, at least initially, to be evaluated.¹²

¹¹ The AAIA is more comprehensive in its coverage of fees than were the predecessor provisions in force at the time this Court decided *Evansville*, *supra*.

¹² Accordingly, we do not argue, as amicus American Trucking Associations, Inc., erroneously suggests (Br. 21), that federal law somehow authorizes the States to burden interstate commerce without further review. On the contrary, the federal aviation laws together demonstrate congressional intent to require local fees to be "reasonable" in much the same sense as would be required under judicial dormant Commerce Clause review, but to have issues of what fees are "reasonable" in this specialized context resolved in the first instance by the Secretary. See *Merrion*, 455 U.S. at 156 (eschewing Commerce Clause review where such judicial review "would duplicate the administrative review called for by the congressional scheme"). See also 14 C.F.R. 399.110(f) (stating Secretary's policy not to limit State's exercise of its proprietary powers, providing that "such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective" (emphasis added)). The issue here is not the availability of, but the forum for, federal review.

Amicus American Trucking Associations, Inc. (ATA), suggests (Br. 20-21) that the AAIA is merely a funding statute that establishes contractual commitments. As discussed above, however, the AAIA is much more than just a funding statute; it is a key element of the statutory framework that gives the Secretary primary responsibility for the oversight of virtually all aspects of the Nation's airways and airports, *including* the financing of future development through, among other sources, reasonable user fees.

The ATA also relies (*e.g.*, Br. 9, 17) on *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), which undertook a Commerce Clause analysis of a State's attempt to limit out-of-state sales of electricity generated within the State, despite the existence of comprehensive general regulation of interstate power issues under the Federal Power Act. *New England Power*, however, involved a "standard 'nonpre-emption' clause" stating simply that federal law would not deprive a State of its lawful authority over the exportation of hydroelectric energy across state lines. 455 U.S. at 343; *id.* at 341. The corresponding aviation law provision is found in Section 105(b)(1) of the FAA, 49 U.S.C. App. 1305(b)(1), which states that federal preemption of laws relating to rates, routes, and services of air carriers does not otherwise limit state-owned or operated airports from exercising their proprietary powers and rights. But unlike *New England Power*, this case involves other, much more specific provisions of the AHTA and the AAIA, which embody affirmative congressional action in the area of airport user fees and revenue generation. This is not a case of federal silence. See *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 9-13 (1986) (international agreements establish government action and obviate dormant Commerce Clause analysis).

III. ALTHOUGH THE DETERMINATION OF REASONABLENESS SHOULD HAVE BEEN LEFT TO THE SECRETARY IN THE FIRST INSTANCE, THE COURT OF APPEALS' ANALYSIS ON THE MERITS IS GENERALLY CONSISTENT WITH FEDERAL LAW AND POLICY

Any discussion of the merits of a rate reasonableness dispute such as this one necessarily demonstrates Congress's wisdom in designing a statutory framework that relies on the administrative process, utilizing the Secretary's unique perspective and accumulated expertise, in making such determinations in the first instance. Because the Secretary has not had an opportunity to evaluate the parties' substantive positions in the course of an appropriate administrative proceeding, we express no definitive opinion on the ultimate merits of petitioners' claims. From a general review of the opinions and record in this case, however, it would appear that the lower courts' decisions on the merits comport with this Court's prior decisions and are generally consistent with federal statutory law and policy.

In *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-717 (1972), this Court held that a state airport tax or fee that is "based on some fair approximation of use" and "is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred * * * will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users." Congress responded to and limited *Evansville* through the prohibition of airport head taxes in 49 U.S.C. App. 1513(a) (Supp. III 1991). Although their position is somewhat unclear, petitioners appear to accept *Evansville's* standard as the test by which the reasonableness of respondents' fees should be measured under Section 1513(b). Pet. Br. 22-23 & n.20; com-

pare *id.* at 27 n.29. In their view (Br. 23-40), respondents' fee structure fails that test because (i) petitioners are assertedly charged more than their fair share of the allocated costs for air operations, (ii) excessive revenues are generated, and (iii) the fees discriminate against petitioners in favor of "local" aviation.

A. Petitioners complain first (Br. 23-26) that concessionaires are allocated none of the airport's "air-operations" costs,¹³ thus increasing the costs allocated to petitioners and therefore presumptively recoverable under 49 U.S.C. App. 1513(b). We note, however, that petitioners suggest no specific method for allocating to concessionaires the costs of activities (*i.e.*, air operations) in which they do not directly participate. Such practical questions would, of course, be an appropriate subject of administrative consideration in a proceeding before the Secretary, whose expertise would no doubt be helpful in determining the practicability of possible alternative cost accounting models. In any event, this Court in *Evansville* minimized the significance of the specific fee determination methodologies, and stressed that fees need only "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." 405 U.S. at 716, 717. The Court also recognized that an airport may lawfully distinguish among classes of users, including concessions, based on their differing uses of airport facilities. *Id.* at 718-719. Thus, the fact that respondents allocate the costs of air operations to petitioners and general aviation, but not directly to the concessions, presents no obvious conflict with *Evansville*.

¹³ Petitioners do not define the term, but presumably they refer to the costs of operating runways, taxiways and so forth. See Br. 24-25 (distinguishing "terminal area" costs); Pet. App. 12a.

As to federal statutory law and policy, the provision on which petitioners rely states simply that the AHTA's prohibition of head taxes shall not prevent an airport from collecting "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. 1513(b). The statute does not define "reasonable," or address by its terms fees collected from users other than "aircraft operators." See Note, *supra*, 93 Yale L.J. at 324 n.35 (Section 1513(b) was not intended to "dictate how or from whom airport costs should be recovered"). Similarly, the AAIA provides that covered airports must be "available for public use on fair and reasonable terms and without unjust discrimination," and that air carriers may be charged only nondiscriminatory fees "directly and substantially related to providing air transportation." 49 U.S.C. App. 2210(a)(1).

Under these statutes, the Secretary's policy is that rates and charges should ordinarily correspond to the costs incurred in providing related facilities and services. Airports are given wide latitude, however, in selecting a particular rate methodology and fee structure. As long as an airport's charges to air carriers do not result in revenues that exceed by more than a reasonable margin the costs of servicing those carriers, the Secretary would normally sustain those charges as reasonable under federal law. See Federal Aviation Administration, *Airport Compliance Requirements*, Order No. 5190.6A §§ 4-13, 4-14, at 20-22 (Oct. 2, 1989) [hereinafter FAA Order No. 5190.6A]; 14 C.F.R. 399.110(f). Without, of course, prejudging the result of any proceeding that might be brought before the Secretary on the issue, there appears to be no indication in this record that the result should be different here.

B. Petitioners next argue (Br. 27-36) that respondents' fee methodology is unreasonable because it generates substantial "excess" revenues. The AHTA does not ad-

dress the question of accumulated surpluses. Under the AAIA, however, in order to obtain federal funding for airport development an airport operator must "maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible." 49 U.S.C. App. 2210(a)(9). Petitioners infer from this affirmative mandate an implied prohibition: that airports may charge "only those fees necessary" to break even. Br. 27; see *id.* at 29. Nothing in the AAIA, however, supports that strained interpretation of Section 2210(a)(9).¹⁴

The principal statutory limitation on the generation of airport surpluses is found instead in another provision of the AAIA, which requires "all revenues generated by the airport * * * [to] be expended for the capital or operating costs of the airport." 49 U.S.C. App. 2210(a)(12). By its terms, this provision applies to revenues from concessions as well as carriers and clearly contemplates the accumula-

¹⁴ As support for their interpretation of Section 2210(a)(9), petitioners refer (Br. 27) to legislative history not of the AAIA, but of the AHTA, which suggests that that statute's prohibition on head taxes was intended to prevent financial windfalls. Similarly, petitioners seriously mischaracterize (Br. 28) a passage in *Evansville*, 405 U.S. at 720, as holding that airport fees are per se excessive if they "do more than meet * * * past, as well as current, deficits." The Court in *Evansville* merely pointed out that on the facts of that case the "excessiveness" inquiry was an easy one, because the airlines could not show that the airport's fees did more than account for past and present losses; its discussion in no way suggested a break-even test to define the upper limit of fee reasonableness. Finally, petitioners' reliance on *Indianapolis*, 733 F.2d at 1268, and *City & County of Denver*, 712 F. Supp. at 840, to support their "excess revenues" argument is also misplaced. Although both courts were aware of the AAIA, neither ruled on the significance of that statute to the question of accumulated surplus airport revenues. See 733 F.2d at 1265-1266; 712 F. Supp. at 839.

tion of funds for future capital outlays, but also suggests that revenues may not be accumulated indefinitely or in unlimited amounts. As a matter of federal policy, "[t]he progressive accumulation of substantial amounts of airport revenues may suggest an inquiry as to the reasonableness of user charges and fees." FAA Order No. 5190.6A, *supra*, § 4-20.c, at 31; see also 49 U.S.C. 2210(a)(1) (airport must be available on "fair and reasonable terms").

Once again, such inquiries are best undertaken by the Secretary, with the benefits of administrative procedure, a national perspective, and both practical and policy expertise. Conversely, they are ill suited to initial development and determination—as opposed to appellate review—in the courts. Petitioners have not requested that the Secretary undertake any inquiry into the allegedly excessive airport revenues accumulated by respondents. Without such an inquiry, however, it cannot be said that the airport has accumulated revenues so excessive as to render the user fees charged to petitioners unreasonable under federal law.

C. Last, petitioners contend (Br. 37-39) that respondents discriminate against them unlawfully by requiring them to bear all of their allocated costs, while charging "general aviation" (*i.e.*, noncommercial) users only 20% of the costs allocable to them.¹⁵ In *Evansville*, however, this Court was concerned with discrimination between interstate and intrastate commerce and travel. While peti-

¹⁵ Claims of "discrimination" in the charges assessed various classes of airport users are properly considered under the AAIA, rather than the AHTA, which is concerned with the "reasonableness" of airport user fees. See, *e.g.*, *New York v. United States*, 331 U.S. 284, 344-345 (1947) (drawing similar distinction). Compare Pet. Br. 38 n.48. The court of appeals held, however, that there is no private right of action under the AAIA, Pet. App. 5a-6a, and petitioners do not contest that holding.

tioners carefully characterize the "general aviation" users at issue in this case as "locally-based," they cite no evidence to suggest a legally significant equation between the commercial/noncommercial distinction drawn by respondents' fee structure (see Pet. App. 3a & n.2) and an interstate/intrastate distinction that might raise concerns under the AAIA or the Commerce Clause. See *Evansville*, 405 U.S. at 717, 718-719. Thus, petitioners have certainly not demonstrated, on this record, unlawful discrimination against interstate commerce.¹⁶

As to discrimination between airport users proscribed by the AAIA, the Secretary's principal concern is that a commercial air carrier not be assessed charges substantially higher either than its own properly allocated costs or than the fees charged to other commercial carriers making similar use of the airport. See 49 U.S.C. App. 2210(a)(1). In this case, the lower courts concluded that the fees charged petitioners approximate the costs related to their own use of the airport's facilities; although the charges levied on noncommercial users are lower than those users' allocated costs, the shortfall is made up out of concession revenues, rather than out of the fees charged petitioners. See Pet. App. 17a-20a, 37a. Moreover, noncommercial aviation's use of the airport is not necessarily similar to

¹⁶ Amicus ATA admits this failure of proof (Br. 23 n.8), but suggests that respondents' fee structure might, depending on the answers to several unanswered factual questions, be unlawfully discriminatory. Br. 25-26. The ATA therefore apparently suggests remand to the district court for "properly focused factual development" of the case. Br. 22, 26. It does not, however, explain why petitioners should be given a second opportunity to prove their claims in this case. In any event, as we have argued, the appropriate vehicle for any challenge to respondents' fees, and for ensuring a "proper focus" in any further factual development, is an administrative proceeding before the Secretary, not remand to the district court.

that of the commercial airlines. See *Evansville*, 405 U.S. at 718-719. Thus, on the basis of this record, and again without prejudging the outcome of any later proceeding before the Secretary, petitioners do not appear to have demonstrated "unjust discrimination" under the applicable federal law. 49 U.S.C. App. 2210(a)(1).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1993

APPENDIX

The Anti-Head Tax Act, 49 U.S.C. App. 1513 (1988 & Supp. III 1991), provides in pertinent part as follows:

§ 1513. State taxation of air commerce

(a) Prohibition; exemption

No State (or political subdivision thereof * * *) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except as provided in subsection (e) of this section * * *.

(b) Permissible State taxes and fees

Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State (or political subdivision thereof * * *) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof * * *) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

* * * * *

(e) Authority for imposition of passenger facility charges

(1) In General

Subject to the provisions of this subsection, the Secretary may grant a public agency which

(1a)

controls a commercial service airport authority to impose a fee of \$1.00, \$2.00, or \$3.00 for each paying passenger of an air carrier enplaned at such airport to finance eligible airport-related projects to be carried out in connection with such airport or any other airport which such agency controls. For purposes of this subsection, financing an eligible airport-related project includes making payments for debt service on bonds and other indebtedness incurred to carry out such project.

(2) Use of revenues and relationship between fees and revenues

The Secretary may grant a public agency which controls a commercial service airport authority to impose a fee under this subsection to finance specific projects only if the Secretary finds, on the basis of an application submitted for such authority—

(A) that the amount and duration of the proposed fee will result in revenues (including interest and other returns on such revenues) which do not exceed amounts necessary to finance the specific projects; and

(B) that each of the specific projects is an eligible airport-related project * * *.

* * * * *

(11) Application process

* * * * *

(C) Opportunity for consultation

Before submission of an application under this paragraph, a public agency shall provide reasonable notice to, and an opportunity for consultation with, air carriers operating at the airport. * * *

* * * * *

(D) Notice and opportunity for comment

After receiving an application under this paragraph, the Secretary shall provide notice and an opportunity for comment by air carriers and other interested persons concerning such application.

(E) Approval

A fee may only be imposed pursuant to this subsection if the Secretary approves an application granting authority for the imposition of such fee. Not later than 120 days after the date of receipt of such an application, the Secretary shall make a final decision regarding approval of such application.

(12) Recordkeeping and audits

* * * * *

(C) Set-off

If the Secretary determines that a fee imposed pursuant to this subsection is excessive or that the revenues derived from such fee are not being used in accordance with this subsection, the Secretary may set

off such amounts as may be necessary to ensure compliance with this subsection against amounts otherwise payable to the public agency under the Airport and Airway Improvement Act of 1982 [49 U.S.C. App. 2201 *et seq.*].

The Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2210, provides in pertinent part as follows:

§ 2210. Project sponsorship

(a) Sponsorship

As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that —

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination, including the requirement that (A) each air carrier using such airport (whether as a tenant, non-tenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classifications such as tenants or nontenants, and signatory carriers and nonsignatory carriers, and such classification or status as tenant or signatory shall not be unreasonably with-

held by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status, and (B) each fixed-based operator at any airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport utilizing the same or similar facilities, and (C) each air carrier using such airport shall have the right to service itself or to use any fixed-base[d] operator that is authorized by the airport or permitted by the airport to serve any air carrier at such airport;

* * * * *

(9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection * * *;

* * * * *

(12) all revenues generated by the airport, if it is a public airport, and any local taxes on aviation fuel * * * will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property; * * *

* * * * *

The Federal Aviation Act of 1958, 49 U.S.C. App. 1301 *et seq.*, provides in pertinent part as follows:

§ 1354. Other powers and duties of Secretary of Transportation

(a) Generally

The Secretary of Transportation is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this chapter, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this chapter.

* * * * *

§ 1482. Complaints to and investigations by Secretary of Transportation and Board

(a) Filing of complaints; complaints against members of the Armed Forces

Any person may file with the Secretary of Transportation or the [Civil Aeronautics] Board,* as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary of Transportation or the Board to investigate the matters complained of. Whenever the Secretary of Transportation or the Board is of the opinion

* The Civil Aeronautics Board has been abolished, and its functions under these provisions transferred to the Secretary. See 49 U.S.C. App. 1551(b)(1)(E).

that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. * * *

* * * * *

(c) Entry of orders for compliance with chapter

If the Secretary of Transportation or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this chapter or any requirement established pursuant thereto, the Secretary of Transportation or the Board shall, subject to section 1502(a) of this Appendix [relating to international agreements], issue an appropriate order to compel such person to comply therewith.

* * * * *

§ 1486. Judicial review

(a) Orders subject to review; petition for review

Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this Appendix, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

(d) Power of court

Upon transmittal of the petition to the Board or Secretary of Transportation, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Secretary of Transportation. Upon good cause shown and after reasonable notice to the Board or Secretary of Transportation interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) Conclusiveness of findings of fact; objections

The findings of facts by the Board or Secretary of Transportation, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Secretary of Transportation shall be considered by the court unless such objection shall have been urged before the Board or Secretary of Transportation or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) Review by Supreme Court

The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Secretary of Transportation shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28.

§ 1487. Judicial enforcement; jurisdiction; application; costs

(a) If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any

certificate or permit issued under this chapter, the Board or Secretary of Transportation, as the case may be, their duly authorized agents, or, in the case of a violation of section 1514 of this Appendix [relating to suspension of air services by the President], the Attorney General, or, in the case of a violation of section 1371(a) of this Appendix [relating to certificates of public convenience and necessity], any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, condition or limitation, and requiring their obedience thereto.

* * * * *

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No. 92-97

Supreme Court, U.S.

FILED

AUG 4 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., *et al.*,
Petitioners,
v.

COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**BRIEF OF AIR TRANSPORT ASSOCIATION
OF AMERICA AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

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**BRIEF OF AIR TRANSPORT ASSOCIATION
OF AMERICA AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE

The Air Transport Association of America (ATA) was founded in 1936. It is a non-profit, unincorporated association of federally certificated air carriers that provide scheduled and charter passenger and cargo services. ATA's 17 operator members¹ account for more than

¹ Alaska Airlines, Aloha, Airlines, American Airlines, American Trans Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, Federal Express, Hawaiian Airlines, Northwest Airlines, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, USAir. Associate members are Air Canada and Canadian Airlines International.

97% of the passenger and cargo traffic flown annually in the United States. In 1992, ATA members enplaned 441,187,000 domestic and international passengers. Domestically, ATA's members serve approximately 400 airports—virtually every commercial airport in the United States—and in 1992 had more than 12,000,000 arrival and departure operations.

ATA's principal function is to represent the interests of the U.S. commercial airline industry before the United States Congress, Federal agencies, state legislatures, and before Federal and state courts. ATA works closely with the various Federal agencies that regulate the airline industry, in particular the Department of Transportation and the Federal Aviation Administration. ATA frequently submits briefs *amicus curiae* in Federal and state court proceedings on matters of concern to the industry.

With respect to this case,² ATA is able to provide the Court with a broad perspective of the issues raised by the parties and the impact of this case on air travel as a whole. ATA, both directly and through its members, is intimately familiar with the manner in which airports operate and the mechanisms for the funding of their operations. Through its legislative activities relative to funding the Airport Improvement Program administered by the Federal Aviation Administration (FAA), and by reviewing the applications of more than 170 airports for approval to collect passenger facility charges for airport development projects, ATA has developed considerable expertise regarding airport operating costs and funding. Moreover, ATA recently began a program of financial audits of airport operations. This has enabled ATA to gain an even greater insight into airport financing and cost accounting methodologies.

The outcome of this case will have far-reaching effects on air transportation. Airport costs are among the fastest

² The parties have consented to the filing of this brief *amicus curiae*.

growing of airline operating costs. The facts below demonstrate the importance of this case to Congress' intent that the national air transportation system operate without undue burden from airport user fees.

SUMMARY OF ARGUMENT

This brief discusses the nationwide consequences of the decision of the Sixth Circuit and the extent to which that decision subverts Congress' intent in the Anti-Head Tax Act. In that Act, Congress recognized that the Nation's airports are publicly funded and should not impose additional user fees beyond those that are reasonable and necessary to make those airports "self-sustaining." Congress clearly and certainly intended to prevent the Nation's airports from becoming profit centers for local communities.

Nevertheless, as will be shown, numerous airports now encroach on Congress' limitations and that trend is increasing as the pressure on communities to find revenue sources for local needs intensifies. As a result, fees and charges imposed by numerous airports no longer merely "sustain" airport operations, but, instead, create the very "financial windfall" that Congress intended to prevent. Undoubtedly, Grand Rapids is an extreme example of that trend.

Further confirmation that Congress intended to preclude windfalls such as those at Grand Rapids can be found in its most recent enactment in the area of airport funding. In its 1990 legislation permitting airports to assess and collect certain limited passenger facility charges, Congress made clear that any such charges would be authorized only for specific projects necessary to maintain airport services. It certainly did not authorize what has been created in this case—enormous excess funds having no clear airport purpose whatever.

If the Sixth Circuit is upheld, Congress' intent in both the Anti-Head Tax Act (AHTA) and the Airport and Air-

way Improvement Act will be completely subverted and airports nationwide will be given license to become the enormous profit centers Congress intended to avoid. The result will be a devastating burden on air commerce that those statutes were specifically designed to prevent.

ARGUMENT

THE ECONOMICS OF THE NATION'S AIRPORTS DEMONSTRATE WHY THE ANTI-HEAD TAX ACT AND THE COMMERCE CLAUSE REQUIRE REVERSAL

At its essence, this case asks whether it is reasonable for airport proprietors when setting airport fees for commercial airlines to ignore what this Court already has recognized, that is, that "[v]irtually all who visit [airport] terminals do so for purposes related to air travel." *International Society for Krishna Consciousness v. Lee*, 60 U.S.L.W. 4749 (U.S. June 26, 1992), 550 US. —, 120 L.Ed.2d 541, 112 S.Ct. 2701 (1992) (emphasis added). Simply put, the ground-side, non-aeronautical commercial enterprises (the concessions) at airports would not exist but for the commercial airline operations.³ For example, it is estimated that during the Persian Gulf War, when airline traffic fell off dramatically,

³ As the Second Circuit explained, consumers of airport concession products and services would have no reason to be at an airport but for the commercial airline services. "The Port Authority's terminals are remote from pedestrian thoroughfares and are intended solely to facilitate a particular type of transportation—air travel—unrelated to protected expression . . . It is true that the various commercial establishments and art exhibits at the three airports create an appearance similar to a busy downtown street. It is also true, however, that the facilities in question exist solely to accommodate the needs of air travelers . . ." *International Society for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 581 (2d Cir. 1991) (emphasis added).

U.S. airports lost an average of \$3.1 million *per week* in concession revenues.⁴

Given these realities, it is unreasonable for airports not to consider the effect of concession revenues when determining airline fees and charges. The airport operator that fails to consider concession revenues virtually assures itself of excess revenues. This is so because airlines, and other airport users, are "captive" users. It is in recognition of this reality, together with the importance of assuring that interstate and foreign commerce are not impaired by parochial interests, that Congress and the courts have articulated the requirement that airport fees and charges be "reasonable," that is, that fees and charges as a whole be based on a fair approximation of costs and benefits.

Without these restrictions, airports could extract potentially unlimited tribute from the national and international air transportation system. The result, at best, is that the excess revenues sit idle, looking for a purpose. Such revenues invite misuse and misapplication. Moreover, when local governments are desperate for cash to meet budgetary demands, the inevitable result is that they seek to tap the revenues generated at their airports to pay for non-aviation related services. This, too, of course, is prohibited by the AHTA and the Commerce Clause. Nevertheless, efforts are underway to do just that.⁵

Under the test of reasonableness espoused by the Respondent and adopted by the Sixth Circuit, whereby a "chinese wall" is erected between air-side costs and fees on the one hand, and other airport costs and fees on the other hand, fees may be charged to airlines without regard

⁴ American Association of Airport Executives and Airport Council International—North America (formerly Airport Operators Council International), Statement before the Committee on Public Works and Transportation, U.S. House of Representatives (March 5, 1991).

⁵ See Los Angeles Times, June 23, 1993 at B-1 (*Riordan Makes Case for L.A. in Washington*).

to whether the airport reaps the type of financial windfall proscribed by the Anti-Head Tax Act (AHTA)⁶ and the Commerce Clause,⁷ or whether the airport as a whole is "self-sustaining," as required by the Airport and Airway Improvement Act of 1982 (AAIA).⁸ The result is a legal fiction that, in the end, circumvents the requirement that airline fees and charges be reasonable, and defeats the Congressional purposes underlying the AHTA and the AAIA.⁹

Consequently, the very things that Congress intended to prevent instead occur. First, fees charged to airlines grow at a rate out of all proportion to the airport's real operating costs. Second, airports generate surplus revenues well beyond what is required to be "self-sustaining." The presence of these attributes—fundamentally inconsistent with the purposes underlying the AHTA—are strong indicia that airport fees and charges are unreasonable. And third, the fact that Congress did not intend to authorize such fees and charges has been recently reaffirmed in the Aviation Safety and Capacity Expansion Act of 1990, Pub. L. No. 101-508, Tit. IX, § 9110.

A. Airport Charges Are Out of Control

The U.S. airline industry has lost \$10 billion over the past three years. Air Transport Association of America, *Air Transport 1993: Annual Report of the U.S. Sched-*

⁶ Pub. L. No. 93-44, § 7, 87 Stat. 90, codified as amended at 49 U.S.C. App. § 1513.

⁷ See: *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

⁸ Pub. L. No. 97-248, 96 Stat. 671, codified at 49 U.S.C. App. § 2210.

⁹ The AHTA was intended, *inter alia*, to ensure that airports do not reap "financial windfalls" by imposing direct or indirect charges on persons and goods moving by air. S. Rep. No. 93-12, 93rd Cong., 1st Sess., reprinted in 1973 USCCAN 1434, 1446. The AAIA, by providing Federal funding of airport projects, exacts a promise from airports that the revenues they generate are used for capital and operating costs, so that airports are "as self-sustaining as possible." 49 U.S.C. § 2210(a) (9) & (12).

uled Airline Industry (June 1993). As a result, operating costs have been closely scrutinized and, where possible and consistent with safety obligations, curtailed. Unlike many other cost items, however, airport costs have risen dramatically. Airport charges are among the fastest growing operating expense items incurred by airlines. In the eleven years from 1982 to 1992, airport fees and charges paid by airlines have risen virtually unimpeded—to the point where they no longer bear any rational relationship to other airline operating costs.

On a per-passenger basis, landing fees and rental costs increased 83.2% between 1982 and 1992. *Landing fees alone increased by 79% during that period*. By comparison, consumer prices have risen 46% and the producer price index has risen just 18%. Further, airline labor costs (on a per employee basis) have risen 34%, meal costs have risen 44%, advertising costs (obviously, unlike landing fees, a controllable item) have decreased by 10%, and interest rates have decreased by 15%. The cost of fuel on a per gallon basis has decreased by 36%. In the aggregate, airline operating costs other than airport-related costs have risen only 19.5% since 1992.¹⁰

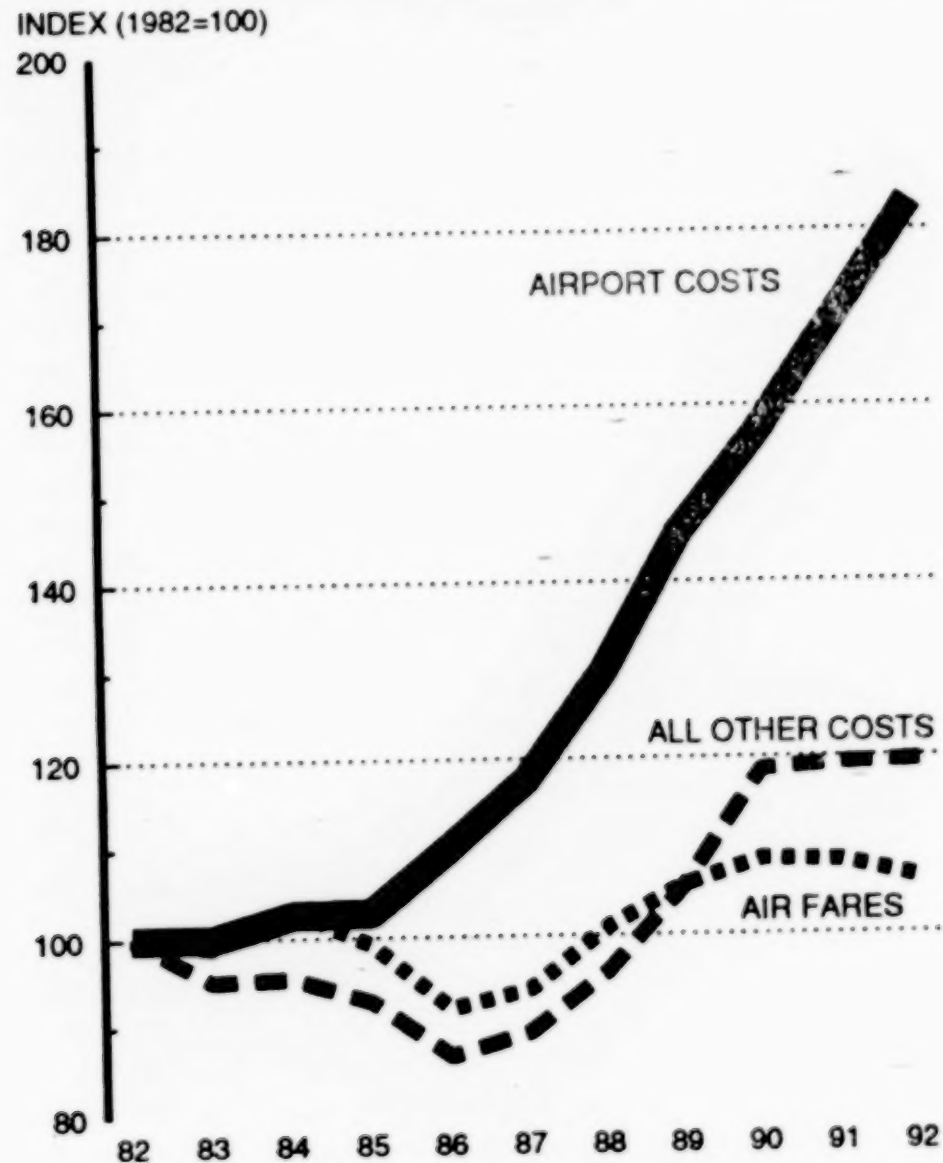
During the same 1982-1992 time period, average ticket prices have increased by only 7%.¹¹

Thus, as can be seen from the chart below, the dramatic increase in fees and charges imposed by airports on the commercial airlines stands out in stark contrast to the other airline operating costs noted above and the moderate increase in the price of airline tickets. Airports' real operating costs do not justify these dramatic increases. The lack of real cost justification is demonstrated by extensive and growing excess airport revenues.

¹⁰ Statistics maintained by Air Transport Association based on data submitted to the Department of Transportation on DOT Form 41. See Air Transport Association of America, *1993 State of the U.S. Airline Industry: A Report on Recent Trends for U.S. Air Carriers* (Feb. 1993).

¹¹ Statistics maintained by Air Transport Association of America.

AIRPORT COSTS PER PASSENGER vs ALL OTHER COSTS and AIR FARES



B. Excess Revenues Are Significant and Extensive

Surplus revenues in excess of operating costs are the second indication of unreasonable landing fees. The latest survey of U.S. airport rates and charges confirms that many of the nation's airports are, in fact, generating excess revenues. American Association of Airport Execu-

tives, *Survey of Airport Rates and Charges 1991-1992* (undated) (the Survey).

For example, among the nation's largest airports, excess revenues for calendar year 1991 include \$137,000,000 at John F. Kennedy International Airport, \$122,000,00 at Newark International Airport, \$66,000,000 at Las Vegas McCarran International Airport, \$58,500,000 at Boston Logan International Airport, \$52,300,000 at Houston International Airport, \$45,000,000 at La Guardia Airport, and \$43,500,000 at Seattle Tacoma International Airport. The nation's twenty largest airports reporting in the Survey averaged more than \$36,500,000 each in excess operating revenues in 1991.

Excess revenues are not limited, however, to the nation's largest airports. Medium and small hub airports also generate significant excess revenues. Twenty-seven medium hub airports, of which Respondent is one, generated \$266 million in excess revenues in 1991, or nearly \$10,000,000 per airport. Forty-six small hub airports generated approximately \$47,000,000 in excess revenues in 1991.

These kinds of surplus revenues, or profits, are exactly the "financial windfalls" Congress intended to prevent. S. Rep. No. 93-12, 93rd Cong., 1st Sess., *reprinted in* 1973 USCCAN 1434, 1446. Congress' reasoning is unavailable. Funding local airport profits necessarily increases airline operating costs which, in turn, cause higher ticket prices to be paid by passengers. *Id.* at 1451.

The impact on the airlines of funding airport excess revenues cannot be understated. Reducing airline costs by just two percentage points would affect hundreds of millions of dollars in revenue. For example, if the Federal ticket tax were reduced by two percent, from 10% to 8%, it is estimated that 6.5 million *additional* passengers would fly annually, airline industry revenues would increase by \$900 million and net profit by \$300 million.

Airport profits, like the ticket tax, sap the ability of the airlines to achieve these results.

If the decision below is upheld, airports across the country will continue to earn more and more excess revenues and will become even more aggressive in exacting still higher payments. The inevitable consequence is that costs of air transportation will likewise grow unabated. This trend will further burden a U.S. airline industry that already has seen seven large airlines slip into bankruptcy.¹² Such a result would necessarily and unduly burden air commerce—the precise result the AHTA was intended to prevent.

C. The Reasonableness of Airport Fees and Charges Must Be Considered in Context With Passenger Facility Charges

In 1990, Congress authorized airports to impose a fee on passengers for the purpose of funding future airport development projects for which funding was otherwise unavailable (Passenger Facility Charge or PFC).¹³ This amendment to the Federal Aviation Act permits most U.S. airports with regularly scheduled service to charge enplaning passengers a PFC of \$1.00, \$2.00 or \$3.00. This funding is in addition to funding under the FAA's Airport Improvement Program ("AIP").¹⁴

¹² Eastern Air Lines, Continental Airlines, Pan American World Airways, Trans World Airlines, America West Airlines, Braniff Airlines, and petitioner Midway Airlines. Today, only three of these airlines continue to operate.

¹³ Aviation Safety and Capacity Expansion Act of 1990, Pub. L. No. 101-508, Tit. IX, § 9110.

¹⁴ The AIP program, established by the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 671, replaced the previous funding program created in 1970 by the Airport and Airway Development Act, Pub. L. No. 91-258, 84 Stat. 219. The AIP program is funded by a 10% federal tax on domestic airline tickets. Since 1982, nearly \$13 billion in AIP funds have been spent on airport improvement projects. *Airport Improvement Program: Opportunity to Consider FAA's Role in Meeting Airport System Needs*, Statement of Kenneth Mead, Director of Transportation

The PFC enabling legislation makes clear that Congress did not abandon its long history of fiscal concern and constraint on airports to ensure that they not reap windfalls when determining rates and fees charged to airlines. The statute states, in pertinent part:

"(7) AIR CARRIER RATES, FEES, AND CHARGES.

"(B) CAPITAL COSTS.—Except as provided by subparagraph (C), a public agency which controls a commercial service airport shall not include in its rate base by means of depreciation, amortization, or any other method that portion of the capital costs of a project paid for using revenues derived from fees collected pursuant to this subsection for the purpose of establishing a rate, fee, or charge pursuant to a contract between such agency and an air carrier."

49 U.S.C. App. § 1513(e)(7)(B).

FAA is given the responsibility for determining whether proposed development projects satisfy the eligibility criteria set out in the statute. 49 U.S.C. App. § 1513(e)(2). In essence, PFC eligibility is limited to projects that are eligible for AIP funding, as well as certain noise abatement/compatibility measures. 49 U.S.C. App. § 1513(e)(15)(C).

As of July 1993, FAA had approved PFC-financed projects at 119 airports totalling \$7.2 billion, and had 62 applications pending for an additional \$3.8 billion. Respondent is among the 119 airports that have obtained approval for PFC funded airport development projects.

Indeed, in this particular case, respondent is authorized to impose, and has begun collecting, a \$3.00 PFC from all enplaning passengers for the construction of a parallel

Issues, U.S. General Accounting Office, before the Subcommittee on Aviation, Committee on Public Works and Transportation, House of Representatives (May 26, 1993) GAO/T-RCED-93-43. Congress appropriated \$1.8 billion for AIP funding. In FY 1992, Congress appropriated \$1.9 billion for AIP funding.

runway and related facilities. Federal Aviation Administration, Record of Decision, Kent County Department of Aeronautics, Grand Rapids, Michigan (September 9, 1992), at 2. Respondent is permitted to collect \$12,500,000. The balance of the cost of this project \$33,585,600, is to be funded by "AIP discretionary funds and funds from other sources." *Id.* This project appears to duplicate exactly a project relied upon by Respondent at trial to justify collecting excess revenues. See Defendant's Exhibit DA 23, APP-001479, lines 26-29. Given the fact that Respondent is collecting a PFC to fund a project which purportedly justified its rates and charges, those rates and charges necessarily are unreasonable.

Against this backdrop, excess airport revenues are uniformly unreasonable. By authorizing a new program to fund needed airport development projects for which funding was otherwise lacking, Congress underscored its intent in the Anti-Head Tax Act that all airport revenues are to be protected. The PFC enabling legislation filled a perceived need for additional airport capital development financing. To suggest that at the same time excess charges could be imposed is illogical and any such charges are necessarily unreasonable within the meaning of the AHTA.

CONCLUSION

The judgment below should be reversed and the case remanded for consideration of petitioners' damages.

Respectfully submitted,

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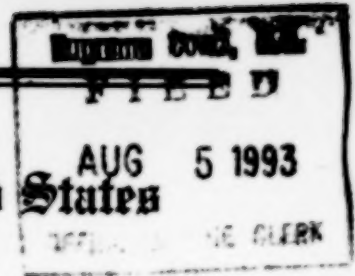
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993



NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC.,
USAIR, INC., AMERICAN AIRLINES, INC. and UNITED
AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS and THE KENT COUNTY DEPART-
MENT OF AERONAUTICS,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THRIFTY RENT-A-CAR SYSTEM, INC.
AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS

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IN SUPPORT OF PETITIONERS

This brief is submitted in support of the position of
Petitioners on the questions presented. Letters evidencing
the consent of Petitioners and Respondents to the filing
of this brief are filed contemporaneously herewith.

INTEREST OF AMICUS CURIAE

Thrifty Rent-A-Car System, Inc., ("Thrifty") is an Oklahoma corporation, which operates and franchises others to operate car rental businesses under, among others, the service mark "Thrifty Car Rental."¹ Thrifty and its franchisees operate approximately 150 locations in the airport-related car rental market, with approximately 30 of these being on-airport and the remainder off-airport, but near the airport. At each airport in which Thrifty and its franchisees operate on-airport, they do so under concession agreements with the airport, pursuant to which they typically pay certain rentals, along with "concession fees" based upon a percentage of their gross receipts from the rental of vehicles, typically 10% of those gross receipts. At a great number of the airports at which Thrifty and its franchisees operate off-airport, airports have imposed fees on gross receipts (typically 7% to 10%) from the rental of vehicles to airport-arriving customers as a "user fee" or "access fee" for the privilege of picking up their pre-reserved customers at the curb at the terminal. More than 75 airports charge off-airport percentage fees.² Charges paid by car rental companies,

¹ Since 1989, Thrifty has been a wholly-owned subsidiary of Pentaster Transportation Group, Inc., which in turn is a wholly-owned subsidiary of the Chrysler Corporation.

² In addition to the inequities in evidence in this case, Respondents, as is typical of airports around the country, charge courtesy vehicle operators, such as hotels and motels, which make similar use of airport facilities as Thrifty, a nominal access fee, while charging Thrifty a gross receipts fee. Respondents have recently instituted at Kent County International Airport an Off-Airport Car Rental fee of 7% of "gross airport revenue" in addition to a fee of \$120 per year, per courtesy vehicle. By contrast, Corporate courtesy vehicles pay only the \$120 annual fee, while Hotels/Motels, Taxis and Charter Vehicles are charged the \$120 annual fee plus \$.50, \$.75 and \$1.00 per trip, respectively. Letter from Robert A. Buchanan to Erik H. Jesson, dated April 16, 1993 ("Buchanan Letter").

which are passed through by them directly or indirectly to the airline passengers using their services, virtually always exceed the actual cost to the airport of providing the facilities and services necessary for the conduct of their businesses.

Airports justify the fees charged car rental companies by contending that the airport provides them customers by permitting them to operate in or drive up to the facilities at which the airlines land their aircraft and deliver the passengers.³ Airports do not supply customers to car rental companies. The airport furnishes an airline traveler a place to land and conduct his business; the airline traveler chooses his own destinations and his own modes of transportation in the air and on the ground.

Airports have also invoked, as justification for imposition of excessive car rental fees, the provisions of Section 2210 of Title 49 App., U.S.C., the Airport and Airway Improvement Act ("AAIA"). In pertinent part, the AAIA requires that, in order to obtain federal grants for airport projects, an airport must "maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible. . . ." and make the airport "available for public use on fair and reasonable terms without unjust discrimination." As Petitioners explain, excessive user fees

³ Counsel for Kent County International Airport recently explained, in a letter to counsel for the Thrifty franchisee serving that airport, the difference between the new off-airport car rental fee and that charged to other ground transportation operators, by stating that taxis, limousines and hotel courtesy vans "are not in direct competition with rental car companies." He went on to point out that the fee is intended to "cover non-signatory operators who use the facilities of the Airport to access a marketplace generated by the Airport," and described the fees Thrifty is required to pay as being "in recognition of the business derived by Thrifty from the Airport in competition with those [on-airport car rental companies] who pay a premium to be under lease on the Airport." Buchanan Letter.

are not necessary to make Respondents' airport self-sustaining. Further, other airports, like Respondents here, deny that either the non-discrimination provisions of the AAIA or the Anti-Head Tax Act, 49 U.S.C. App. § 1513 ("AHTA"), which Congress intended be viewed together with the AAIA, applies at all to such car rental fees. Both the language and history of those statutes belies the position taken by Respondents.

Failure to consider car rental fees when assessing the fairness of an airport's fee structure is a significant omission. Independent studies have estimated that the direct cost of off-airport car rental gross receipts fees to airline passengers alone will be at least \$100 million per year and perhaps as much as \$200 million per year. When the longer-term economic effect of these fees on the competitive environment of the airport-related car rental market is considered, the cost to airline passengers could be as high as \$500 million per year or more.⁴ This is in addition to the cost to airline passengers resulting from the concession fees charged on the gross receipts of on-airport operations. The "airline passenger" who is paying these costs is the very airline passenger, the "person traveling in air commerce," who is among those to whom the protection of the AHTA and the Commerce Clause of the U.S. Constitution, Art. I, § 8, cl.3, should apply. Respondents and other airports have argued that neither Congress nor the Federal Aviation Administration ("FAA") has required them to give any consideration to either the fairness and reasonableness of ground transportation-related fees or the fairness and reasonableness of the total cost to the airline passenger, because "ground transportation" is

⁴ See, e.g., *Airport Access Fees for Auto Rental Companies: A Consumer Perspective*, Consumer Federation of America, June 1988, included in the testimony of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America on Airport Gross Receipts Fees, before the Subcommittee on Economic and Commercial Law, Judiciary Committee, U.S. House of Representatives, June 28, 1990. ("CFA Report")

outside the purview of the AHTA and the AAIA. Some courts have agreed with that contention; others have not.

As amicus curiae, Thrifty offers the Court the perspective of non-aeronautical service providers at the nation's airports. Thrifty does not object to paying a reasonable fee for its use of the airport, and recognizes that this Court has never required that an "exact" measure be used to determine reasonableness of such fees, but Thrifty agrees with Petitioners in this case that the fee structure at Kent County International Airport is unfair and unreasonable, both to the airlines and to car rental service providers, and should be struck down.

SUMMARY OF ARGUMENT

In resolving the conflict between the Sixth and Seventh Circuits, Thrifty urges this Court to adopt the reasoning of the Seventh Circuit in *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984). Speaking through Judge Posner, the Seventh Circuit held that the combination of concession fees and airline user fees caused the total cost on the airlines and their passengers to be unreasonable. Thrifty believes this Court can reach this result either under the Commerce Clause of the United States Constitution or by holding that the AHTA, read in conjunction with the AAIA, requires that the entire fee structure of an airport must meet the AHTA test in order for fees charged airlines to meet the AHTA test. Though it need not necessarily do so to establish the standard, Thrifty urges the Court to hold that the AHTA, read in conjunction with the AAIA, applies directly to on-airport and off-airport car rental fees, since those fees are "fees" or "other charges" on "persons traveling in air commerce."

ARGUMENT

I. FAILURE TO APPLY THE SAME STANDARDS TO CAR RENTAL FEES AS TO AIR TRAVEL FEES RESULTS IN AN OVERALL FEE STRUCTURE WHICH DOES NOT MEET EITHER THE COMMERCE CLAUSE STANDARD OR THE AHTA STANDARD

Failure of regulatory agencies and courts to apply consistent standards to the totality of the airport fee structure has resulted in imposition of fees that are irreconcilable with either the Commerce Clause or the applicable statutes.

The FAA has declined to treat any element of ground transportation as within the ambit of the AHTA. In 1984, the FAA, in response to an inquiry by the House of Representatives, took the position that rental car companies "have not, traditionally, been viewed by the FAA or the Courts as aeronautical activities. Neither have they been so significantly linked with air transportation that they have been included in the definition of air commerce."⁵ More recently, the U.S. Department of Transportation⁶ noted the position of the FAA by citing a February 1, 1985 letter to the Honorable Mark Andrews from former FAA Administrator Donald D. Engen. The DOT Report quotes Mr. Engen's letter as stating:

Historically, the FAA has interpreted [Section 2210] and its parallel predecessor provisions as being directed toward aeronautical users and not being applicable to nonaeronautical users, including providers

⁵ Federal Aviation, *Report*, 1985, p. 2, as cited in CFA Report at p. 44.

⁶ "A Review of The Imposition of Gross Receipts Fees on Off-Airport Car Rental Companies," U.S. Department of Transportation, Report to the Senate Committee on Appropriations; the Senate Committee on Commerce, Science and Transportation; the House Committee on Appropriations; and the House Committee on Public Works and Transportation. April, 1989. ("DOT Report")

of off-airport services. Consequently, the FAA has not become involved in the review of airport operator fee arrangements with nonaeronautical airport users.

. . . The FAA has concluded that [the AHTA] is limited in application to situations involving carriage by aircraft. Since non-aeronautical off-airport service providers are not engaged in carriage by aircraft they are considered outside the protection of [the AHTA] and, consequently, a gross receipts fee imposed upon them by an airport authority is not prohibited.

Quoted in DOT Report, App. B. p. 82, 84. The FAA has taken this position despite the clear language of the AHTA, which on its face applies to more than "carriage by aircraft."

In the absence of clearly-enunciated standards requiring that the fee structure of an airport be, as a whole, fair, reasonable and not unjustly discriminatory, courts have reached inconsistent results in dealing with challenges to car rental fees. For example, the Eleventh Circuit upheld against an Equal Protection challenge an off-airport fee which was *equal* in percentage to the in-terminal concession fee, stating the requirement that the fee not be a "wholly arbitrary act," *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 825 F.2d 367, 371 (11th Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988) ("Alamo/Sarasota I"). Applying the "rational basis" test, the court merely required that the airport's justification for the fee be "at least debatable." *Alamo/Sarasota I*, at 372. There, the court found that it was reasonable to treat off-airport and on-airport car rental companies as receiving the *same* benefit, since they both accessed airport arriving passengers. *Id.*, at 373. Yet, applying the same relaxed standard, a U.S. district court in Michigan found that an on-airport concessionaire was not denied Equal Protection when it was charged 9.5% of its off-airport rental revenue (for rentals within a three-mile radius of the airport) and off-airport car rental companies were charged nothing for their access to the airport.

Budget Rent-A-Car Systems, Inc. v. County of Wayne, Michigan, 742 F.Supp. 947 (E.D. Mich. 1990), *aff'd*, 951 F.2d 348 (6th Cir. 1991). In that case, the court found that the *difference* in fees was justified by the substantial additional benefit Budget received from operating in the terminal. *Id.*, at 951. These cases are examples of the dozens of lawsuits generated by the differing interpretations in the absence of clear standards for determining and reviewing an airport's fee structure.

What the nation's airports have effectively done, and what Respondents are asking this Court to perpetuate by affirming the Sixth Circuit in this case, is to isolate the consideration of the fees imposed on various users, without ever focusing on the fairness and reasonableness of the fee structure as a whole and its effect on persons traveling in air commerce. By isolating each category of fees and applying different arguments with regard to each, excessive fees charged users have been justified without considering the impact of the fee structure as a whole on the airline passenger or on the companies on which the fees are initially imposed.

For example, the evidence in this case shows that the airlines are charged on a "cost" basis, while car rental concessions are charged on a "benefit" or "what the market will bear" basis. In each instance, however, the ultimate burden is borne by the airline passenger, resulting in a totality of fees which, when added to other sources of funding, is more than the total cost of operating and improving the airport. In addition, since the trial of this matter, Respondents have made application to institute Passenger Facilities Charges (see Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 13)⁷ and have imposed off-airport access fees on car rental companies. All these charges are in addition to the 10% federal tax on airline tickets. When each of these

⁷ 1990 amendments to Section 1513 permit Passenger Facility Charges of \$1, \$2, or \$3 per enplanement, up to two enplanements per one way trip.

charges is viewed in isolation from the others, it may seem superficially plausible to justify them as reasonable. When they are viewed together and when the classifications are analyzed, the fee structure is grossly unreasonable and unfair.

As noted by the Federal Trade Commission in its comments on the DOT report, the "most desirable fee structure would assess charges that allow the airport to meet its revenue needs while achieving the greatest level of overall consumer welfare," DOT Report, App. A, p. 66. If airports are not required to have a fee structure which is fair, reasonable and not unjustly discriminatory overall, then this objective cannot be achieved.

While differing over the availability of a Commerce Clause challenge, both Petitioners and Respondents correctly rely on this court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), as providing the underlying "minimum" test for airport user fees under the Constitution. In *Evansville*, this Court stated its reluctance to determine for the states the amount and method of collection for such fees, but did require that states do so under a "uniform, fair and practical standard." *Id.*, at 713. It is difficult, if not impossible, to believe that this Court intended that an airport could meet this test without consistently applying some reasonable, uniform, fair and practical standard, not only *within* certain categories of users or types of charges, but *between and among* all users and types of charges. To apply the test otherwise is to permit airports to impose charges and fees which, when added together, are an undue burden on interstate commerce.

This has certainly been the case with regard to the relationship between fees charged airlines and fees charged car rental concessionaires and off-airport car rental customers at the nation's airports where, as here, airports are charging the airlines fees based upon the actual costs of facilities they use and then including these same costs in

justifying charging car rental companies for the "benefit of the presence of the airport facility." Under this funding scheme, an airline passenger who rents a car is charged twice for the use of the airport, while an airline passenger who rides a private automobile pays only once. Whether an airport is using a residual cost financing method or a compensatory one, the same logic applies. Both the overall fee structure and each individual fee determination should be fair and reasonable.

The same rationale applies to the applicability of the AHTA to the issues in this case. As discussed more fully below, this Court should hold that the AHTA directly governs car rental concession fees and off-airport car rental fees. But even if such fees are not separately governed by the AHTA, read in conjunction with the AAIA, the Court should hold that fees charged airlines cannot meet the AHTA and AAIA requirements unless the overall fee structure, and each individual fee determination, is fair, reasonable, and not unjustly discriminatory. If the Sixth Circuit decision is upheld, many more of the nation's airports will adopt a funding structure similar to that of Respondents, one that is unfair, unreasonable and unjustly discriminatory.⁸

To establish the controlling principle of fairness and reasonableness, this Court need not set out in detail an appropriate specific fee structure or put itself in the place of local or state governments in determining one. It need only adopt the rationale that in order for the fees charged to airlines to meet either the *Evansville* test or the AHTA test, the overall fee structure, including fees on car rental concessions and off-airport car rental fees, must be fair, reasonable and non-discriminatory. To merely hold that

⁸ As pointed out in Petitioners' Brief on Petition for Writ of certiorari, after this Court upheld the head taxes in *Evansville*, a large number of airports enacted head taxes. Similarly, after the 11th Circuit upheld the imposition of a 10% off-airport access fee in *Alamo/Sarasota I*, the number of airports imposing such fees increased sharply.

the airlines' fees should be reduced by the amount of the excess concession fees would not resolve the basic issue. The overall fairness of the fee structure and its impact on persons traveling in air commerce should govern. With this standard clearly enunciated, the considerable body of statutory and case law defining fairness, reasonableness and non-discrimination could be utilized by airports to arrive at appropriate fee structures and by courts to evaluate them.

II. CAR RENTAL CONCESSION FEES AND OFF-AIRPORT CAR RENTAL ACCESS FEES ARE A "FEE" OF "OTHER CHARGE" LEVIED DIRECTLY OR INDIRECTLY ON "PERSONS TRAVELING IN AIR COMMERCE" WITHIN THE MEANING OF 49 U.S.C. APP., § 1513

Respondents would have this Court limit the scope of the Anti-Head Tax Act, 49 U.S.C. App., § 1513, by ignoring its reference to "persons traveling in air commerce" or by so limiting the definition of "persons traveling in air commerce" as to render it of no effect. They take this position in spite of their assertions, and those of airports generally, in other contexts, that car rental companies serving the airport market are wholly dependent for their livelihood on the stream of airline passengers arriving at the airport.

In upholding off-airport gross receipts fees, various courts have, at the urging of airports who were parties to those actions, found a close nexus between the arrival of the customer by airplane and activities of the car rental company at the airport. For example, the Eleventh Circuit upheld against an equal protection challenge off-airport fees of 10%, in part because the airport had a "rational basis" for concluding that the airport would lose concession revenues if the "airport passenger" chooses to rent a car off-airport. *Alamo/Sarasota I*, at 373. On appeal after remand on remaining issues, the Eleventh Circuit also adopted the argument of the airport that

"Alamo is reaping the benefit of the entire airport facility because in the absence of the airport Alamo could lose a significant portion of its business," finding that "Alamo does enjoy the indirect 'use' of the entire airport facility through the travelers it services." *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516, 519 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991) ("Alamo/Sarasota II"). Likewise the Ninth Circuit denied a Commerce Clause challenge by Alamo to a 7% gross receipts fee levied by the Palm Springs, California, airport, noting that the fee was assessed for "using the access roads to pick up and drop off airline passengers who rent cars." *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1991), as Amended on Denial of Rehearing and Rehearing En Banc (1992). The court there found that the fee "approximates the indirect use to the entire facility that Alamo makes through the travelers its services." *Id.* at 31.

In each of these cases, it was effectively conceded that the fee charged exceeded the direct cost to the airport of providing the particular facilities and services directly used by the car rental companies, i.e. the roadways and curbsides.⁹ The fees were upheld because of the assumed "benefit" to such companies derived from the presence of the whole airport facility. The nexus between the car rental company and the airport facility was the airline passenger.

Courts are not alone in recognizing a close relationship between the air travel portion of a passenger's trip and

⁹ The CFA Report notes two studies, one at a large hub and one at a small hub, which determined actual cost per courtesy vehicle at 30 to 60 cents per round trip. By contrast, a typical one-day rental of a vehicle will cost in excess of \$30 (though weekly rates in leisure markets may bring this cost down to between \$15 and \$20 per day). Thus, a "trip" on a courtesy vehicle where the rental is subject to a gross receipts fee of 10% would cost a customer approximately \$3 for a one-day rental, \$6 for a two-day rental, and so on.

the car rental portion. The Consumer Federation of America, in a series of reports, found that econometric evidence supports the conclusion that the car rental industry is closely tied to the travel industry and to airports. CFA Report, p. 5. The CFA described the manner in which airports set charges for various types of airport use as "inefficient and inequitable" and noted the legal loophole created by treating the connection between airports and off-premise businesses as close enough for gross-receipts fees to be considered nominally "rational," yet not close enough to treat customers subject to the fees as being in "air commerce" and thus covered by the AHTA. CFA Report, Executive Summary, p. 4. Noting that the FAA itself has declined to treat any element of ground transportation as within the ambit of the AHTA, the CFA went on to describe many airports as a "monopoly that has slipped past regulation because the agency which could have exerted jurisdiction chose not to." *Id.*, p. 4.

Clearly, Section 1513 prohibits direct or indirect levy of any "fee" or "other charge," not only "on the carriage of persons traveling in air commerce" or "on the sale of air transportation or on the gross receipts therefrom" but on "persons traveling in air commerce" (emphasis added). "Head taxes" are direct charges on such "persons" which were specifically prohibited by Section 1513 (though limited "Passenger Facility Charges" are now permitted under amendments to the statute). Logic dictates that "other fees and charges" such as landing fees, terminal rentals and other charges on airlines that are effectively passed through to passengers in ticket prices are charges on "the carriage of persons traveling in air commerce" or on the "sale of air transportation."¹⁰

Unless Congress intended to bring within the protection of Section 1513 other direct and indirect charges such as

¹⁰ Reasonable charges to airlines for these items are specifically permitted under the AHTA.

car rental concession fees and off-airport access fees, there was no need to include the phrase "fee . . . or other charge" in conjunction with the phrase "on persons traveling in air commerce." If the intent were merely to outlaw head taxes or fees charged to or through airlines, the other words in the section accomplish that objective. Instead, Congress included a blanket restriction on all charges on such persons, whether imposed directly or indirectly. It is a settled principle of statutory construction that a court is obliged to give effect, if possible, to every word Congress used. See e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1977). Ordinarily, where, as here, terms are connected by a disjunctive, each should be given separate meanings, unless otherwise indicated by the context. *Id.*

Indeed, the Federal Aviation Act, 49 U.S.C. App., § 1301(23), defines "Interstate air commerce" as "the carriage by aircraft of persons . . . in [interstate] commerce . . . whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." By this definition, Congress recognized that a passenger is not less in "air commerce" because a part of his or her journey may be completed by means other than riding an airplane. To determine otherwise is to create an analytical complexity not reasonably capable of resolution. Attempts to determine when a passenger is no longer an "airline customer" and becomes a "car rental customer" can produce almost laughable results. For instance, in a recent attempt to isolate the amount of terminal space to include in "costs" attributable to off-airport car rental businesses, a study performed for the Baton Rouge, Louisiana, airport was based in part on a survey of the users of rest rooms in the baggage claim area to determine how many such "users" were going to rent a car from an off-airport car rental company. A similar survey was not conducted outside rest rooms elsewhere in the terminal because of the assumption that up until somewhere between the gate and the baggage claim area,

the customer was an "airline" customer and not a "car rental" customer.

Surely Congress intended instead to consider that a person is "traveling in air commerce" until he completes his use of the airport facility, whether (in the case of originating or transfer passengers) by enplaning or (in the case of terminating passengers) by arranging for ground transportation.

It follows that if "car rental customers who arrive on an airplane" are "persons traveling in air commerce," then Congress intended to include within the purview of Section 1513 all fees and charges assessed on such persons (either directly or through charges passed on to them by those companies who provide goods and services for them at the airport) for use of the airport facility. Exclusion from the scope of Section 1513 (and the concomitant reasonableness test in both Section 1513 and Section 2210) of fees and charges related to ground transportation, and particularly car rental, ignores the economic impact of such fees and charges on the overall cost of air travel and on the provision of travel services to persons traveling in air commerce.

In a 1989 report to Congress, the United States Department of Transportation noted that "imposition of gross receipts fees will increase the price of car rental services and decrease the supply of car rental services." DOT Report, p. 4, 44. Noting the interrelation of these fees to other airport charges, the DOT found that at ninety (90) airports described in one survey, car rental revenues constituted 24% of the landside revenues of the airports and 13% of the total revenues of the airports. *Id.*, p. 4-5. At these ninety (90) airports, 56% of the total airport revenues came from landside operations and only 44% from airside operations. Another study of thirty (30) major airports estimated off-airport car rental revenues at those airports at \$670 million, thus creating the potential for collection of gross receipts fees of \$67 million, which could,

in theory, be used to lower charges to other users of the airport. *Id.*, p. 5. As previously noted, the CFA estimates that the total cost to consumers of the off-airport fees alone could be as much as \$500 million annually, or more. Indeed, it should be noted that on any given trip involving both air travel and car rental, depending on the city of origin and destination and the length of the car rental, low advance-reservation air fares may be lower than or approximately equal to the charges for the car rental portion of the trip. Thus, to ignore charges on airline passengers related to the car rental portion of the trip creates a substantial risk of unfairness and unreasonableness to car rental companies and their customers and in the total fee structure of the airport.

For the reasons outlined here the Court should hold that charges for car rental concession fees and off-airport car rental fees are governed by the AHTA, read in conjunction with the AAIA, and must be fair, reasonable and not unjustly discriminatory.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed on the issues presented.

Respectfully submitted,

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**BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC.,
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QUESTIONS PRESENTED

We will address the following questions:

1. Whether the Anti-Head-Tax Act, 49 U.S.C. App. § 1513(b), contains the manifestation of unambiguous congressional intent necessary to authorize the States to discriminate against or unreasonably burden interstate commerce through assessments that otherwise would violate the Commerce Clause.
2. Whether transportation facility user fees that have the practical effect of shifting a disproportionate amount of costs to interstate users from intrastate users violate the Commerce Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-97

NORTHWEST AIRLINES, INC., ET AL., PETITIONERS

v.

COUNTY OF KENT, MICHIGAN, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC.,
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. ("ATA"), is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. That industry consists of every type of motor carrier operation throughout the United States and includes tens of thousands of interstate for-hire carriers, private carriers, and leasing companies.

The interstate trucking industry is traditionally one of the principal targets of discriminatory state taxation and regulation. As a result, ATA and its members have brought or participated in Commerce Clause challenges to a wide range of state taxes, fees, and regulations before this Court and

other state and federal courts. *E.g.*, *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *Dennis v. Higgins*, 498 U.S. 439 (1991); *American Trucking Associations, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991); *Commonwealth of Kentucky Transportation Cabinet v. American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988).

Because highway users are subject to substantial federal regulation, states frequently defend undue burdens on interstate transportation — most recently, restrictions on the interstate transportation of wastes — by claiming that a particular restriction was authorized by a federal statute. *E.g.*, *Chemical Waste Management, Inc. v. Templet*, 967 F.2d 1058 (5th Cir. 1992), cert. denied, 113 S. Ct. 1048 (1993); *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991); *National Solid Wastes Management Association v. Alabama Department of Environment*, 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001 (11th Cir. 1991). ATA accordingly has a strong interest in the issues presented in this case.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief we address the Sixth Circuit's decision that the Airlines were foreclosed from asserting the Commerce Clause component² of their challenge to a system of fees imposed on users of the Kent County International Airport

¹ Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.

² The Airlines also claimed that the user fees violated the Anti-Head-Tax Act, 49 U.S.C. App. § 1513, the Airport and Airway Improvement Act, 49 U.S.C. App. § 2210, and state law.

near Grand Rapids, Michigan.³ The court of appeals held that a subsection of the Anti-Head-Tax Act, 49 U.S.C. App. § 1513(b), overrode the constraints imposed by the Commerce Clause upon the States. Section 1513(b) states: "[N]othing in this section shall prohibit a State * * * owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

The Sixth Circuit's decision disregards the plain language of Section 1513(b), which explicitly confines the insulating effect of that subsection to the prohibitions in Section 1513(a). The legislative history, and this Court's interpretations of similarly worded statutes, only confirm the obvious meaning of the words "nothing in this section shall prohibit": Section 1513(b) exempts "reasonable" airport user fees from the Anti-Head-Tax Act, not from the Commerce Clause. The Sixth Circuit's holding is still more difficult to fathom when Section 1513(b) is compared to the statutes in which this Court has found congressional authorization for Commerce Clause violations. Each of those statutes reflected an affirmative delegation of new power to the States, not a mere limitation of the scope of a federal statutory prohibition.

The stated rationale of the court of appeals is astonishingly broad, foreclosing judicial review under the Commerce Clause of state taxes and regulations whenever Congress has "taken [any] action to regulate the area" of commerce at issue. 955 F.2d at 1063. The Sixth Circuit thus would not only transform every savings clause into an authorization to burden interstate commerce, but would infer such an authorization from every federal regulatory scheme to the extent that state power was recognized but not wholly preempted.

³ We refer to the respondents, Kent County, the Kent County Department of Aeronautics, and the Kent County Board of Aeronautics, as the "Airport."

Finally, in the event the Court takes the occasion to decide the Commerce Clause issue and to clarify the proper standards to guide Commerce Clause evaluation of user fees for transportation facilities, we urge it to remain steadfast in its rejection of fee structures or taxing schemes that shift the tax burden to out-of-state businesses by systems of exemptions or classifications.

ARGUMENT

I. CONGRESS HAS NOT AUTHORIZED THE STATES TO IMPOSE AIRPORT TAXES OR USER FEES THAT OTHERWISE WOULD VIOLATE THE COMMERCE CLAUSE

This Court repeatedly has held that "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve * * * a violation of the Commerce Clause." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992); see also *Maine v. Taylor*, 477 U.S. 131, 139 (1986); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 90-92 (1984); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982).

In "most * * * cases" this Court has "looked for an express statement of congressional policy." *Wunnicke*, 467 U.S. at 90. Although "[t]here is no talismanic significance to the phrase 'expressly stated,'" the Court does "require[] that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *Id.* at 91. Accordingly, the Court has found approval for otherwise impermissible state action only in the rare cases in which a State adduces "persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." *Sporhase*, 458 U.S. at 960.

The Sixth Circuit professed to find the requisite "clear and unambiguous intent" in the Anti-Head-Tax Act, which provides, in pertinent part:

(a) No State (or political subdivision thereof * * *) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom * * * .

(b) [N]othing in this section shall prohibit a State (or political subdivision thereof * * *) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof * * *) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 U.S.C. App. § 1513. The statutory language indisputably reflects an intent that the Anti-Head-Tax Act itself not work an outright prohibition on "reasonable" airport rental charges and user fees; but it hardly follows from this that Congress intended to "extend to the States new powers * * * that they would not have possessed absent the federal legislation." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980). The alternative propositions that the Airport and Airway Improvement Act, 49 U.S.C. App. § 2210, or the Federal Aviation Act as a whole, 49 U.S.C. App. §§ 1301 *et seq.*, somehow silently supplant the restrictions of the Commerce Clause are also entirely without merit.

A. Section 1513(b) Does Not Evince Clear and Unambiguous Congressional Intent to Supplant the Commerce Clause.

1. By Its Plain Meaning, Section 1513(b) Limits The Preemptive Effect Of Section 1513(a), But Does Not Override The Limitations On State Power That Flow From The Commerce Clause.

a. Section 1513(b) by its express terms protects state fees and charges only against challenge under the Anti-Head-Tax Act: “nothing in this section” (emphasis added) – that is, in the Act itself – “shall prohibit a State” from imposing certain identified types of taxes or fees that are “reasonable.” Not one word of Section 1513(b) purports to do anything other than limit the reach of the prohibition contained in Section 1513(a).

The syntax of Section 1513(b) is as plain as the vocabulary of those first four words. For one thing, the phrase “nothing in this section shall prohibit” is not the language of “positive expression” (*Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946)), or of “affirmative[] permiss[ion]” (*White v. Massachusetts Council of Construction Employees*, 460 U.S. 204, 213 (1983)), or even of “affirmative[] contemplat[ion] of otherwise invalid state legislation” (*Wunnicke*, 467 U.S. at 91-92). In fact there is nothing “positive” or “affirmative” in that language at all.

Surely no one would seriously contend that, if some other, separate federal statute restricted in some manner the States’ ability to impose user fees on aircraft operators, that restriction would be overridden by Section 1513(b). Still less convincing is the proposition that Section 1513(b)’s exemption from the effect of Section 1513(a) excuses constitutional violations. Yet that is precisely the argument made by the Airport, and accepted by the Sixth Circuit.

The Sixth Circuit apparently believed that the requisite congressional authorization might be found in the word “reasonable.”⁴ But “reasonable” fees are insulated only against the effect of Section 1513(a). The latter provision prohibits a broad range of taxes, fees, and “other charge[s]” levied “directly or indirectly” on “persons traveling in air commerce,” on the “carriage” of those persons, “on the sale of air transportation,” or “on the gross receipts therefrom.” Any charge or fee imposed on commercial “aircraft operators” ultimately is paid by “persons traveling in air commerce” and amounts to an assessment on the “carriage” of those persons. Without the exemption in Section 1513(b), many charges there described might be deemed to have been preempted by the preceding subsection of the Act; certainly much avoidable litigation would have ensued. Yet to exempt *all* “rental charges, landing fees, and other service charges” on “aircraft operators” would nullify the prohibition on head taxes. Any government that owned or operated an airport could simply redesign its head tax as a “service charge” or “landing fee” that would return revenues roughly in proportion to the number of passengers carried by an airline.

By placing a limit on the exemption in the second clause, the word “reasonable” makes clear that the prohibitions in Section 1513(a) take precedence in case of an overlap, and thus helps to preserve the internal consistency of Section 1513. Cf. *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 170 (1st Cir. 1989) (equating finding that landing fee was “reasonable” under § 1513(b)

⁴ The same logic would lead to the absurd conclusion that the federal requirement that States allow commercial motor vehicles “reasonable access” between the national highway network and truck terminals and facilities for food, fuel, repairs and rest, 49 U.S.C. App. § 2312, itself authorizes the collection of discriminatory access fees from out-of-state truckers, so long as the access remains “reasonable” under the statute.

with finding that fee was not "a head tax or its equivalent" and thus was not preempted by § 1513(a)). It scarcely would be "reasonable," given the broad prohibitions in Section 1513(a), to levy a fee that imposed a head tax under a different name.

In sum, the Anti-Head-Tax Act reflects a carefully circumscribed withdrawal of power from the States. The Act preempts a narrow category of state assessments on air commerce: head taxes and the like. Yet "nothing in this section" alters the States' power to set landing fees and other user charges. That exemption, in turn, is limited to "reasonable" fees and charges. But no part of the statutory language can be read to *expand* state taxing authority by authorizing the imposition of discriminatory or unreasonably burdensome levies on interstate business.⁵

b. This Court has often considered statutory provisions that are phrased similarly to Section 1513, providing that nothing in a particular statute prohibits a State from exercising a particular type of authority. The Court has never read

⁵ The general policy of the Anti-Head-Tax Act was to *supplement* the constitutional *restrictions* on state assessments upon interstate airport activity. The Act was passed in direct response to *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), in which the Court held that the Commerce Clause did *not* invalidate a head tax levied on airline passengers. See *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 9-10 (1983). The very *raison d'être* of the Act was to "prohibit[]" the "new, inequitable, and potentially chaotic burden" of the head taxes otherwise permitted by the Commerce Clause. S. Rep. No. 12, 93d Cong., 1st Sess. 17, reprinted in 1973 U.S.C.C.A.N. 1434, 1446. Clearly Congress thought that the Commerce Clause allowed the states too much power, not too little, and the Senate committee said so in no uncertain terms: "[T]he Court decision [in *Evansville*] does not provide adequate safeguards to prevent undue or discriminatory taxation." *Ibid.*

such language to indicate a congressional intent to allow the States to act in a manner that would otherwise violate the Commerce Clause. On the contrary, this Court well recognizes the formulation "as a standard 'non-preemption' clause." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982). The Court has held repeatedly that an expression of congressional intent not to preempt state action through adjacent positive legislation is not at all the same thing as "unmistakably clear" intent to authorize state action that otherwise would violate the Commerce Clause.

In *New England Power*, New Hampshire claimed that its ban on the export of hydroelectric power was authorized by a Federal Power Act section that provided that the Act "*shall not . . . deprive* a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy." 455 U.S. at 341 (quoting 16 U.S.C. § 824(b)(1)) (emphasis added). Although (in the words of the Sixth Circuit in this case) the federal government undeniably had "taken" considerable "action to regulate" hydroelectric power, the Court held that "this provision is in no sense an affirmative grant of power to the states to burden interstate commerce in a manner which would otherwise not be permissible." *Ibid.* (internal quotation marks omitted). Rather, the statutory language evinced only an intent that the Act *not reduce* states' power. See also *Wyoming v. Oklahoma*, 112 S. Ct. at 802.

Similarly, the Court held that a clause that provided that a federal law "*shall not be construed as preventing* any State from exercising such powers and jurisdiction which it now has or may hereafter have" over banks (12 U.S.C. § 1846 (emphasis added)) merely "define[d] the extent of the federal legislation's pre-emptive effect on state law." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980). The statutory language did not "support the contention that it also was intended to extend to the States new powers * * * that they would not have possessed absent the federal legislation,"

but rather “applie[d] only to state legislation that operates within the boundaries marked by the Commerce Clause.” *Ibid.* And in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), the Court held that statutory language providing that “nothing in this Act shall be construed as affecting * * * or to in any way interfere with the laws of any State * * * relating to * * * water used in irrigation” — a provision worded, if anything, more broadly than Section 1513(b) — merely “defines the extent of the federal legislation’s pre-emptive effect on state law.” *Id.* at 959 (emphasis added). When “such language” excepts from preemption a certain segment of state law, “[t]he negative implications of the Commerce Clause * * * are ingredients of the valid state law to which Congress has deferred.” See *id.* at 959-960.

The resemblance between the wording at issue in these cases and that in Section 1513 need not stand on its own footing. In another context, this Court already has placed Section 1513(b) firmly in the line of standard non-preemption clauses. In *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 12 n.6 (1983), the Court explained that Section 1513(a) “pre-empt[s] a limited number of state taxes,” while Section 1513(b) “clarifies Congress’ view that the States are still free to impose [other assessments] on airlines and air carriers.” The first clause of Section 1513(b), like the second clause at issue in this case, begins, “Nothing in this section shall prohibit * * * .” The Court interpreted the first clause as an “exemption” by which certain property taxes may “escape preemption.” 464 U.S. at 13. The second clause surely is nothing more.⁶

⁶ The Court again examined the preemptive force of Section 1513 in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986). It proceeded from a discussion of preemption to an analysis of the validity of a state statute under the Commerce Clause, albeit in that case the Foreign Commerce Clause was at (continued...)

2. *Section 1513(b) Is Far Different From The Statutory Provisions That This Court Previously Has Held To Authorize Undue Burdens On Commerce.*

In determining whether Congress intended a statute to supplant the dormant Commerce Clause, this Court consistently demands evidence that the enacting Congress “affirmatively contemplate[d] otherwise invalid state legislation.” *Winnicke*, 467 U.S. at 91. We have shown above that, by contrast, in enacting Section 1513 Congress intended to *invalidate* otherwise *valid* state legislation, but not to *validate* otherwise *invalid* legislation.

The Court has declared its reluctance to find authorization to violate the Commerce Clause unless the “congressional intent and policy to insulate state legislation from Commerce Clause attack have been ‘expressly stated.’” *Winnicke*, 467 U.S. at 90 (quoting *Sporhase*, 458 U.S. at 960). Indeed, the Court has long recognized that only a “few unique federal statutes” indicate “consideration or desire to alter the limits of state power otherwise imposed by the Commerce Clause.” *United States v. Public Utilities Commission*, 345 U.S. 295, 304 (1953).

Of the very few statutes that have satisfied the Court that Congress did intend to alter those limits, some, like the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1012), explicitly refer to the dormant commerce power: “The business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business,” and “silence on the part of the Congress shall not

⁶ (...continued)

issue. *Id.* at 7-13. Chief Justice Burger did not persuade a single colleague to join his concurring view that Section 1513(b) displaced Commerce Clause analysis by authorizing the taxes at issue. *Id.* at 13-17.

be construed to impose any barrier to the regulation or taxation of such business by the several States." Almost all the rest involve an affirmative statement in the statutory language to the effect that the States "may" do something that on its face would violate the Commerce Clause. *E.g.*, *New York v. United States*, 112 S. Ct. 2408, 2425 (1992) (42 U.S.C. § 2021e(d)(1), stating that waste disposal fees that discriminate by State of origin "may be charged," clearly "authorize[s] the States to burden interstate commerce"). Indeed, as late as 1982 — nine years after the enactment of the Anti-Head-Tax Act — this Court noted that it had theretofore consistently held that "Congress consented to the unilateral imposition [by States] of unreasonable burdens on commerce" *only* when the congressional "intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated." *Sporhase*, 458 U.S. at 960 (internal quotation marks omitted).

In only two instances has this Court been willing to infer authorization from less forthright statutory language. In both cases, however, the language and legislative history of the statute made clear Congress's intent to authorize the States to exceed the limitations on their authority imposed by the Commerce Clause.

In *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204, 213 (1983), the Court held that Congress authorized cities that received federal development grants to discriminate in favor of their own residents when hiring workers for construction projects funded with those grants. This ruling relied substantially on the fact that "federal regulations * * * affirmatively permit[ted] the type of parochial favoritism" challenged in that case. *Id.* at 213. Indeed the regulations not only permitted, but in fact specifically compelled local governments to use federal construction grants to employ and train persons residing in the local area "to the greatest extent feasible." *Id.* at 213 n.11. Thus the discrimination in *White* flowed from the local government's

obedience to an explicit federal policy that had been promulgated by an agency in the executive branch pursuant to authority delegated by Congress. By contrast, no federal rule or law compels or even "affirmatively permit[s]" airport user fee schemes that discriminate against or unreasonably burden interstate commerce. Cf. 49 U.S.C. § 11506 (authorizing Interstate Commerce Commission to promulgate standard for state motor carrier fees, and providing that any similar fee not in accordance with ICC standard "shall be deemed to be a burden on interstate commerce.")

The second instance in which this Court inferred congressional authorization through something other than express statutory language involved a truly "unique federal statute." In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985), the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.*, forbade the Federal Reserve Board to approve any application by a bank in one state to acquire a bank in another state unless the acquisition was "specifically authorized by the statute laws" of the home State of the acquired bank. *Id.* at 168 (quoting 12 U.S.C. § 1842(d)). The state statute at issue in *Northeast Bancorp* authorized such acquisitions only by banks in nearby states with which the home State had a reciprocal agreement.

Although the federal statutory language did not expressly authorize a home State to discriminate among other States, this Court upheld the Board's approval and the underlying state statute. The Court relied primarily on the legislative history of the Holding Company Act (472 U.S. at 169-173), which indicated that the amendment was intended to serve "policies of community control and local responsiveness of banks." *Id.* at 169. Congress had approved of similar types of regional discrimination in state regulation of intrastate banking, and specifically intended "to allow each State flexibility in its approach" to the permission or prohibition of interstate banks. *Id.* at 171.

As we have explained above, the legislative context of the Anti-Head-Tax Act is entirely different. No comparable policy of encouraging local control or accommodating state experimentation underlies Congress's negative reaction to the proliferation of airport head taxes. Rather, the Anti-Head-Tax Act outlawed certain state-imposed burdens on commerce despite a clear holding of this Court that they were permissible under the Commerce Clause.

3. *The Sixth Circuit's Standard For Inferring Congressional Authorization Is Sharply Inconsistent With This Court's Precedents.*

The Sixth Circuit did not measure the Anti-Head-Tax Act against this Court's consistent requirement that Congress "manifest its unambiguous intent before a federal statute will be read to permit or to approve * * * a violation of the Commerce Clause." *Wyoming v. Oklahoma*, 112 S. Ct. at 802. Instead, the court of appeals declared that the Commerce Clause limits the ability of the states to tax or regulate interstate commerce *only* "if Congress ha[s] taken *no other action* to regulate the area." 955 F.2d at 1063 (emphasis added). The Sixth Circuit (*ibid.*) and the United States (in its amicus brief at 18) rely on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), for this novel approach. That reliance is utterly misplaced.

The question in *Merrion* was whether a severance tax enacted by an Indian tribe violated the Commerce Clause. Although the Court doubted that the Commerce Clause applied to the ordinances of a sovereign Indian tribe under any circumstances, 455 U.S. at 153-154, it proceeded to analyze the legislative background of the tax.

Congress had "affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect." 455 U.S. at 155. First, a tribe could not "adopt[] or revise[] its constitution to announce its intention to tax nonmembers" until it obtained the approval of the

Secretary of the Interior. *Ibid.* Second, "before the ordinance imposing the * * * tax challenged [in *Merrion*] could take effect, the Tribe was required again to obtain approval from the Secretary." *Ibid.* Thus, a federal agency acting pursuant to congressionally delegated authority issued the decision that put the challenged tax in force. The tax not only bore a federal imprimatur, like the statute in *Northeast Bancorp.*, but indeed amounted to a federal legislative act.

In finding that the tax in *Merrion* was not subject to Commerce Clause review, this Court pointedly distinguished state and local taxes like the one at issue in the present case. The Court stressed that the tribal tax was "in a posture significantly different from a challenged state tax, which does not need specific federal approval to take effect, and which therefore requires, in the absence of congressional ratification, judicial review to ensure that it does not unduly burden or discriminate against interstate commerce." *Id.* at 155-156. By contrast, judicial review of the tribal tax "would duplicate the administrative review called for by the congressional scheme." *Id.* at 156.

In the present case — as in the typical case — the "challenged state tax * * * does not need specific federal approval to take effect." And therefore it most certainly *does* require "judicial review to ensure that it does not unduly burden or discriminate against interstate commerce." This Court's subsequent cases uniformly have recognized that *Merrion* did not abolish the requirement that Congress clearly express its unambiguous intent to authorize Commerce Clause violations, even when federal legislation touched upon the same subject matter as a state regulation. *Wyoming v. Oklahoma*, 112 S. Ct. at 802; *Maine v. Taylor*, 477 U.S. at 138-139.

A moment's reflection brings home the broad disruption of the federal-State balance that would ensue were this Court to adopt the Sixth Circuit's astonishingly inclusive standard for inferring congressional authorization of Commerce Clause

violations. Under this Court's precedents, it always has been clear that Congress could approve a scheme in which federal regulation could exist side by side with state regulation, without thereby automatically authorizing the States to violate the Commerce Clause. It was against this unchanging background that Congress passed the Anti-Head-Tax Act, as well as a plethora of other statutes that afforded the States some role in an area regulated in part by the federal government.

The implications of foreclosing Commerce Clause review of all state taxes and regulations whenever Congress has "taken * * * other action to regulate the area" are made explicit in the Acting Solicitor General's arguments opposing certiorari. In that amicus brief (at 18-19), the United States appears to equate every "exercise[] of [Congress's] Commerce Clause authority" with an "act" that has "struck the balance [Congress] deems appropriate." That view would exempt from Commerce Clause review all state activity that is related to hundreds, if not thousands, of federal statutes. Indeed, because it is the rare area of commerce that has not been touched by at least some federal regulation, that approach would eviscerate the Commerce Clause, even though Congress — acting in reliance on this Court's long-standing rule requiring an unambiguous manifestation of intent — intended no such thing.

Moreover, under the Acting Solicitor General's view, even statutes that simply prohibited certain actions might authorize the States to discriminate against or unduly burden interstate commerce. Section 1513(a) could stand alone as an authorization, on the theory that, by forbidding the actions enumerated in that subsection, Congress would be deemed to have "struck the balance it deems appropriate," necessarily exempting all other state impositions in the area from Commerce Clause review. Under this imaginative logic, a double negative could supply the "unmistakably clear" manifestation of "unambiguous intent" to permit a violation of the Commerce Clause. For example, a provision — contained within

a section explaining the preemption of state law — that reads, "A State * * * may not levy any fee in connection with the transportation of hazardous materials that is not equitable," 49 U.S.C. App. § 1811(b), would become a blanket authorization to discriminate against interstate commerce so long as the fees met some *ad hoc* test of "equity."

Even if this Court were to decide, a little more narrowly, that Congress silently supplants the Commerce Clause when it enacts a "comprehensive scheme of federal regulation and oversight," a host of statutes would become licenses for state discrimination against interstate commerce. The Federal Power Act surely imposes on hydroelectric power one of the more sweeping federal regulatory schemes, yet in *New England Power* this Court found that fact insufficient to support a conclusion that Congress had thereby displaced judicial Commerce Clause review; what is more, it held that a clause expressly reserving to the states their "lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line" did not license the States to violate the Commerce Clause. See 455 U.S. at 341-343; see also *Wyoming v. Oklahoma*, 112 S. Ct. at 802. And the Interstate Commerce Commission's regulations on truck safety did not stop the Court from subjecting to Commerce Clause review state standards that expressly were *not* preempted by the federal scheme. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 n.5 (1959) (referencing former 49 C.F.R. pts. 190-197).

In addition, despite the significant role afforded the States in the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and the Comprehensive Environmental Resource Conservation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, the lower courts have rejected attempts to transform those statutes into broad charters to burden interstate commerce. *E.g.*, *Chemical Waste Management, Inc. v. Templet*, 967 F.2d 1058 (5th Cir. 1992), cert. denied, 113 S. Ct. 1048 (1993); *Hazardous Waste Treatment Council v. South*

Carolina, 945 F.2d 781 (4th Cir. 1991); *National Solid Wastes Management Association v. Alabama Department of Environment*, 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001 (11th Cir. 1991).⁷ Those decisions would be cast into doubt, if not invalidated outright, were this Court to adopt the Sixth Circuit's expansive view of congressional authorization.

And, to turn to our area of concern, Congress extensively regulates both the highways and the interstate trucking industry. Federal legislation expressly requires the States to allow commercial motor vehicles up to a specified size "reasonable access" between designated highways and terminals and facilities for food, fuel, repairs, and rest. 49 U.S.C. App. § 2312. It scarcely could be argued that, by imposing the access requirement, Congress thereby authorized the States to take every other conceivable action to discriminate against or unreasonably burden interstate trucking. Yet that conclusion follows inevitably from the reasoning of the Sixth Circuit and the United States.

In short, under the Sixth Circuit's standard, every comprehensive federal regulatory scheme that countenances continued state power within the field — a popular legislative model indeed — would supplant the dormant Commerce Clause, providing the States with a license to tax and regulate irrespective of any adverse effects on interstate commerce

⁷ The Low Level Waste Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b *et seq.*, which added to a federal regulatory scheme clear authority to charge discriminatory disposal fees, would have been entirely unnecessary if the original Act, by "ced[ing] some regulatory authority to the states," had removed disposal of the referenced wastes from the protection of the Commerce Clause. *Washington State Building Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) ("Congress stopped short of granting the states power to ban wastes transported from outside their borders"), cert. denied, 462 U.S. 913 (1983).

other than those prohibited by each particular regulatory scheme. Vast areas of commerce would be opened by judicial fiat — indeed, by judicial *volte-face* — to incursions by the States, to be judged only by a set of statutory standards that were never designed to protect interstate commerce (much less to remove the protections of judicial Commerce Clause review).

4. *If, Contrary to Our Submission, the Anti-Head-Tax Act Displaces the Commerce Clause, There is Nonetheless No Basis to Construe the Word "Reasonable" to Authorize Fees that Discriminate Against or Unreasonably Burden Interstate Commerce.*

Although the Sixth Circuit held that the standard of reasonableness under the Anti-Head-Tax Act was similar to the Commerce Clause standards set forth in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), the court also held that under the Act it could evaluate the fees charged commercial aviation only in a vacuum, that is, irrespective of the treatment of other classes of users; it thus created a large loophole not present in normal Commerce Clause analysis. We submit that if the Anti-Head-Tax Act forecloses judicial review of state taxes and regulations under the Commerce Clause by its use of a standard of "reasonableness," that standard is properly interpreted to incorporate the principles of Commerce Clause analysis that prohibit discrimination against or undue burdens upon interstate commerce.

Simply put, there is not one word in the statute, or one shred of evidence in the legislative history, that Congress intended that a fee could be "reasonable" and thus permissible under the Anti-Head-Tax Act even though it would violate the dormant Commerce Clause. As we explained above, the Act clearly was a reaction to what Congress perceived as too permissive a reading of the Commerce Clause in *Evansville*.

What is more, the word "reasonable," like "equitable" or similar generalities, does not in itself indicate the slightest intent to trench upon the free trade area protected by the Commerce Clause. Rather, under their natural interpretation, such words require both compliance with the background constitutional principles embodied in the Commerce Clause and in addition fairness and rationality in any other applicable respects. Thus "reasonable" fees must pass muster under a "Commerce Clause plus" analysis that is *more stringent* than Commerce Clause analysis alone.

B. A Federal Statute Does Not, By Merely Addressing an Area of Commerce, Exempt All State Action in that Area from Commerce Clause Review.

The United States argued at the petition stage (Br. 19) that the Airport and Airway Improvement Act of 1982, 49 U.S.C. App. §§ 2201 *et seq.* ("Improvement Act"), "explicitly and unambiguously *addressed the subject* of airport fees and rentals charged to all airport users" (emphasis added). The statutory section cited by the United States, 49 U.S.C. App. § 2210, does no more, however, than set out contractual commitments that the Secretary of Transportation must obtain from airport authorities as conditions precedent to the disbursement of federal airport development grants. That provision supplies no basis for inferring that Congress made a considered decision to remove state charges for airport use from the strictures of the Commerce Clause. See *Wunnicke*, 467 U.S. at 91.

If every federal *funding* statute exempted related state action from the Commerce Clause, few areas of commerce would remain protected by that erstwhile bulwark of a unified economy. First, a vast array of statutes aiding the States in one or another endeavor would also (quite without any intention to do so) authorize discrimination against interstate commerce within the funded activity. Even more striking

would be the treatment of state activities that could have been, but were not, funded: those activities would be subject neither to statutory restraints on the ability to discriminate against interstate commerce (because the unfunded activities would not be subject to any conditions placed upon funding), nor to constitutional restraints (because the funding statute would have "exercised" Congress's Commerce Clause power and thus displaced limitations imposed by the dormant Commerce Clause). See U.S. Br. at 18-19.

No more tenable is the United States' contention (Br. 18) that the protections of the Commerce Clause necessarily have been superseded by "the comprehensive scheme of federal regulation and oversight of the Nation's airways and airports," as reflected in the Federal Aviation Act, 49 U.S.C. App. §§ 1301 *et seq.*, the Improvement Act, and the Anti-Head-Tax Act. Indeed, the contention is directly contrary to the precedent of this Court. If a "comprehensive scheme of federal regulation and oversight" were enough to authorize a State to violate the Commerce Clause in any way not prohibited by the statutory scheme itself, then surely *New England Power*, *supra*, was wrongly decided. In that case the Court addressed a scheme of "federal regulation and oversight" at least as comprehensive as that for aviation. Yet, as the Court made crystal clear, complexity and comprehensiveness of a regulatory framework do not substitute for a clear manifestation of Congress's "intent and policy to sustain state legislation from attack under the Commerce Clause." *New England Power*, 455 U.S. at 343 (internal quotation marks omitted). No matter how extensive the federal regulation in an area, if Congress does not include a provision authorizing States to burden interstate commerce, the Court has "no authority to rewrite its legislation based on mere speculation as to what Congress probably had in mind." *Ibid.* (internal quotation marks omitted).

II. TRANSPORTATION FACILITY USER FEES THAT HAVE THE PRACTICAL EFFECT OF SHIFTING COSTS TO INTERSTATE USERS FROM IN-STATE USERS VIOLATE THE COMMERCE CLAUSE

The Airlines' Commerce Clause claim, as we understand it, is that the fee structure adopted by the Airport results in the imposition of discriminatory and excessive charges on interstate commerce. This assertion rests on two premises: that the fee structure shifts costs of airport operation from general aviation to commercial aviation; and that those two categories consist of materially different proportions of persons or businesses engaged in interstate, as opposed to local or intrastate, activities. Although this Court may prefer to remand the Commerce Clause issues for fuller consideration in the first instance by the court of appeals, we address those issues briefly, in case the Court decides to resolve them itself.

Perhaps the most important point to recognize is that Commerce Clause analysis looks beyond the surface of a scheme of taxes or fees. This Court will sustain a state tax against a Commerce Clause challenge only if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In addition, a fee levied directly upon the users of a state facility must not be "excessive in comparison with the governmental benefit conferred." *Evansville*, 405 U.S. at 716-717; see also *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-623 & n.12 (1982). Of particular importance to ATA is the potential for a State to use a complex, facially neutral user fee scheme to shift the costs of transportation-related facilities or services — whether airports or highways or hazardous waste cleanup activities — disproportionately from in-state to out-of-state users. Accordingly we confine our analysis to the discrimina-

tion issue, and express no opinion on the ultimate merits of the Airlines' case.⁸

A user fee "discriminat[es] against interstate commerce" if the fee allocates the recovery of facility costs in such a manner that a class of predominantly interstate users is charged at a higher rate (judged in proportion to services provided) than a class of predominantly in-state users. This analysis simply transfers to the analysis of transportation facility user fees the principles that guided this Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (tax exemption applied only to beverages made almost exclusively in-state), and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22-26, 31 & n.15 (1990) (preferential tax reduction for commodities "commonly grown in Florida").

The inquiry made in *Bacchus* and confirmed in *McKesson* merely brought up to date this Court's long-held view that "[t]he commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). A state or local enactment that on its face treats intrastate and interstate parties equally nevertheless may fall afoul of the Commerce Clause if its "actual effect * * * is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language." *Id.* at 457. Over the years, this Court increasingly has emphasized the "practi-

⁸ In particular, we do not know whether commercial flights from Grand Rapids actually are so much more likely than private flights to be interstate that discrimination in favor of general aviation amounts to discrimination against interstate commerce. Cf. *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262, 1271 (7th Cir. 1984) ("flights by private planes are more likely to be intrastate than airline flights are"). In addition, to determine whether the fee scheme discriminates in violation of the Commerce Clause would require extensive analysis of the similarities and distinctions between the two forms of aviation.

cal effect" and the "economic realities" of state assessments over the "formal language of the tax statute." *Complete Auto*, 430 U.S. at 279.

Within a formally neutral statute, a State might separate users of a transportation facility into classes that are defined so that certain classes are composed predominantly of in-state users, while in other classes out-of-state users predominate, and accord differential treatment to these two classes. By according differential treatment to classes that use the facility in the same way, a State may violate the Commerce Clause even though within each defined class in-state and out-of-state users are treated equally. The result of such differential treatment is that, on the whole, local users of the facility pay less than interstate users, contrary to this Court's admonition that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within a State." *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984). Under such a scheme, a differential fee also may impose an undue burden on interstate commerce if out-of-state users pay disproportionately for the costs they incur or the benefits they derive within the State.

We do not mean to suggest that every disparity between the in-state and out-of-state composition of differently-taxed classes rises to the level of a Commerce Clause violation. The classes, of course, must consist of comparable persons or businesses, and the disparity in their composition must be substantial. A factually intensive inquiry is necessary in order to establish the threshold beyond which classes of users may be identified with in-state or out-of-state interests. That inquiry is by no means unmanageable, as is revealed by the experience of the courts in adjudicating claims of this kind.⁹

⁹ *Bacchus*, 468 U.S. 263 (favored class had virtually no out-of-state members); *McKesson*, 496 U.S. at 31 (favored classes of
(continued...)

In *Evansville*, the Court addressed the challenged head tax in isolation, finding no discrimination because "both interstate and intrastate flights are subject to the same charges." 405 U.S. at 717. The Court apparently did not have before it — and certainly did not address — the argument that the head tax involved the kind of gerrymandering of an assessment scheme to protect local interests that later was struck down in *Bacchus* and *McKesson*.

In this case, because general aviation is charged only 20% of its airside costs, it effectively receives a subsidy from the Airport's concessions profits. If the Airlines are correct, not only is intrastate aviation subsidized at the indirect expense of interstate aviation, but the scheme creates an incentive for the Airport to allocate costs to the Airlines, from which the Airport recovers all allocated costs through fees, as opposed to general aviation, from which the Airport recovers only 20% of allocated costs.¹⁰ If indeed general aviation at Kent County International Airport is identifiably intrastate in character, and if commercial aviation, by contrast, is identifiably interstate, and if the two are sufficiently comparable so that the Commerce Clause forbids discrimination between them, then the constitutionality of the Airport's fee scheme

⁹ (...continued)

fruits disproportionately "adapted to growing" in Florida) (approving relevant analysis in *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000 (Fla. 1988)); *Russell Stewart Oil Co. v. Illinois*, 529 N.E.2d 484 (Ill. 1988) (tax preference covered 99.4% of local production but only 88% of out-of-state production); *Dayton Power & Light Co. v. Lindley*, 391 N.E.2d 716 (Ohio 1979) (of coal used and taxed in State, 80% of the favored class, but only 6% of the disfavored class, produced in-state).

¹⁰ The Airport's allocation of all crash, fire, and rescue costs to the Airlines (thus allowing general aviation a free ride) may reflect this incentive.

may be seriously in doubt. The resolution of those defining issues, we respectfully suggest, requires properly focused factual development in the district court.¹¹

¹¹ If the Court turns to the question whether a user fee is "excessive in comparison with the governmental benefit conferred," the economic realities that affect the state owner of a transportation facility come to the foreground. If the State derives collateral revenue as a result of a facility's use — whether through airport concessions income or through a federal highway subsidy — those benefits to the state should be offset proportionately against any costs allocated to interstate users. A State cannot simply use the extra revenue to reduce in-state user fees without reducing the fees charged out-of-state users, and then claim that the out-of-state users were paying only the costs allocated to them. Because the effect of the subsidy would be to reduce the actual costs incurred by all users alike, to continue to recoup the unreduced costs from out-of-state users would result in a charge that was "manifestly disproportionate," and therefore excessive. See *Commonwealth Edison*, 453 U.S. at 621-623 & n.12 (quoting *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1993

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No. 92-97

**In the
Supreme Court of the United States**

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., ET AL.,
Petitioners,

v.

COUNTY OF KENT, MICHIGAN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

**BRIEF OF AMERICAN ASSOCIATION OF
AIRPORT EXECUTIVES AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS.**

Interest of Amicus Curiae.

The American Association of Airport Executives ("AAAE")
was founded in 1928 to assist airport managers in fulfilling their

responsibilities to the nation's airports, the traveling public and the airport communities. The AAAE has members from almost every commercial airport in the United States; its membership includes managers at airports that enplane 99 percent of the nation's airline passengers. The AAAE represents the interests of airport managers before Congress and federal agencies, and its staff works closely with federal officials to make the nation's airports safe and efficient.

The nation's airports are an essential link in the air transportation system. In order to meet the needs of the traveling public and aircraft operators, including the commercial airlines, the airports must be adequately funded. The AAAE has filed this brief as *amicus curiae* to show, contrary to the arguments of the petitioning airlines (the "Airlines") and the Air Transport Association of America (the "ATA"), that the economics of the nation's airports do not provide any basis for the relief the Airlines seek. Rather, if this Court were to reverse the decision of the Court of Appeals, the ability of the AAAE's members prudently and effectively to manage the nation's airports could be greatly impaired. The AAAE respectfully urges the Court to affirm the Court of Appeals' decision.¹

Summary of Argument.

The Airlines and the ATA claim that airports have generated "excess" non-aeronautical operating revenues by using the compensatory ratemaking method, and that these so-called "surpluses" show that airport charges to commercial aircraft operators for the use of airport facilities are "unreasonable" under the Anti-Head Tax Act (the "AHTA"), 49 U.S.C. App. § 1513, and the Commerce Clause, U.S. Const., art. I, § 8,

¹ Letters of consent for the filing of this brief as *amicus curiae* have been submitted to the Clerk in accordance with Rule 37.3 of the Rules of this Court.

cl. 3. This claim has no evidentiary basis and reflects distorted views about how airports finance their facilities.

Airports that use the compensatory method base their charges to the airlines on the actual costs of the airport facilities the airlines use. These charges have marginal impact on the airlines and have not contributed to recent airline financial problems.

The generation of operating income is not evidence of excessive charges, it is evidence of prudent airport management. Airports have massive capital requirements that can only be met if they have earnings sufficient to meet their debt service obligations.

Congress has directed the nation's airports to be "as self-sustaining as possible" and has recognized, by funding the Airport Improvement Program and authorizing the use of passenger facility charges, that airports cannot be expected to raise all the capital they require even if they have operating surpluses.

Here, the Airlines seek to deprive an airport of its non-aeronautical operating income, by forcing it to charge less than the actual costs of the airport facilities the Airlines use, without assuming any obligation to ensure that the Airport is able to meet its own capital requirements.

Airport owners generally use two alternative methods to determine what they charge airlines for use of the airport: the "compensatory" method, under which the airlines are charged only the actual costs of the facilities they use, and the airport retains non-airline revenues and control of its capital program; and the "residual cost" method, under which the airlines agree to pay whatever costs remain unpaid after all non-airline revenues are collected, and in return for this commitment, the airlines share control of the airport's capital decisions. Both of these methods align control of the revenue stream with financial responsibility for the airport.

The Airlines seek to impose an unprecedented combination of these methods which would give them the benefit of non-air-

line operating income without the burden of assuming the risk of non-airline operating losses. If the Court grants the relief the Airlines seek, the revenue streams that support the debt obligations of airports throughout the country will be threatened.

Neither this Court nor Congress has ever suggested that it is unreasonable for airport owners to recover their actual costs of providing airport facilities to the airlines. There is no justification for the below-cost charges the Airlines continue to pursue in this appeal. The Court should reject the Airlines' claims and declare that the managers of this nation's airports may continue to use the compensatory method to set their airline charges.

Argument.

I. THERE IS NO EVIDENCE THAT AIRPORT CHARGES ARE EXCESSIVE.

The Airlines and the ATA claim that the nation's airports, including the Kent County International Airport, have accumulated "excess revenues" and have therefore charged the Airlines unreasonable rates which should be declared unlawful under the AHTA and the Commerce Clause. The Airlines suggest that these charges have led to their recent financial difficulties. There is no evidence, however, that the nation's airports in general, or the Kent County International Airport in particular, have charged unreasonable rates, accumulated excess revenues, or contributed to the financial problems of the Airlines. In fact, the economics of the nation's airports compel the affirmance, not the reversal, of the Court of Appeals' decision sustaining the use of the compensatory ratemaking method by Kent County.

A. Airport Charges Have Not Caused Massive Airline Losses.

The ATA argues that airport charges have "risen virtually unimpeded" and implies that the increase in airport charges has been a significant cause of the airlines' loss of \$10 billion over the past three years (ATA Brief, pp. 6-8). The Court should give no weight to these claims, for two basic reasons.

First, there is no evidence that airport charges have exceeded the *actual costs* of providing airport facilities to the Airlines. The courts below correctly found that the airport in Kent County only recovered its "break-even" costs from the Airlines and that the compensatory ratemaking method, which is used in Kent County and at many airports throughout the country, is *designed* to produce this result. *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F.Supp. 1112, 1115, 1119 (W.D.Mich. 1990), *aff'd*, 955 F.2d 1054, 1057 (6th Cir. 1992).

Second, airport charges remain only a small fraction of the airlines' total costs and total revenues. Nationwide, charges to commercial aircraft operators for the use of airport facilities average only about 4% of total airline costs. Airport Council International-North America, *Airport Costs and the U.S. Airline Industry* (1993), p. 14. For the Kent County International Airport, the previous charges accepted by the Airlines were only 1.2% of the Airlines' revenues from their Grand Rapids operations, and the challenged charges would have been only 1.5% of their revenues. *Northwest Airlines*, 738 F.Supp. at 1119.

It is, therefore, not surprising that when Congress recently created the National Commission to Ensure a Strong Competitive Airline Industry to investigate the financial health of the airline industry, the Airlines did not claim and the Commission did not find that airport charges have played a significant role in

the industry's losses in recent years.² In fact, the Commission's final report never mentions airport charges as a factor in the airlines' current financial predicament. *See Change, Challenge and Competition: A Report to the President and Congress* (Aug. 1993).

B. Airport Charges Have Not Produced Financial Windfalls.

The ATA also claims in its brief (pp. 8-9) that "many of the nation's airports are . . . generating excess revenues" and producing "financial windfalls." The ATA bases this claim upon what it says are the results of the AAAE's own Survey of Airport Rates and Charges 1991-1992 (undated). Unfortunately, the ATA has badly distorted the Survey in an attempt to mislead the Court.

The AAAE's Survey compiles the operating revenues and operating expenses of airports throughout the country. The Survey does not, however, purport to reflect the *costs of capital* at the nation's airports.³ It is meaningless to say, as the ATA does, that the existence of *operating income* shows that airports have generated "excess revenues" or "financial windfalls." The nation's airports already have enormous capital costs, and

² See Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992, Pub. L. 102-581, tit. II, § 204(c)(1) (directing the Commission to "make a complete investigation and study of the financial condition of the airline industry") and § 204(d)(3)(G) (specifying "user fees imposed on United States airlines" as a matter to be addressed); H. Rep. No. 22, 103rd Cong., 1st Sess. (1993) (not mentioning user fees as a significant factor).

³ From time to time, the AAAE surveys its members about the rates each airport charges air carriers and concessionaires, the type of cost recovery system each airport uses (compensatory or residual), the amount of revenue raised from each type of user, and the charges for the use of each type of airport facility. The survey is intended to provide general information to the AAAE's members as to how their charges compare to the rates at similar airports throughout the country. The survey is not designed to provide a complete financial picture of any specific airport or of the airport industry as a whole.

many airports plan huge capital improvement programs. A brief look at the airports singled out by the ATA demonstrates this critical point.

As reported in the AAAE Survey, the three major airports operated by the Port Authority of New York and New Jersey (John F. Kennedy International Airport, LaGuardia Airport and Newark International Airport) had a combined operating surplus of \$304 million in 1991. This figure, however, does not take into account the airports' share of the Port Authority's administrative expenses (\$48 million), the depreciation of airport capital investments (\$100 million), or any allowance for debt service on the obligations of the Authority (which for all of its facilities was \$295 million in 1991). Moreover, the Port Authority's current capital plan calls for additional investments at these airports of \$2 billion during the five year period 1993-1997.

Similar patterns can be found at the Boston, Houston and Las Vegas airports highlighted by the ATA. The Massachusetts Port Authority produced an operating surplus at Logan International Airport of about \$58.5 million in 1991, but its debt service and required reserve payments for the Airport were approximately \$34 million. Meanwhile, the Logan Airport Capital Plan anticipates capital improvements of \$1.3 billion over the next ten years.

While the AAAE's 1991-1992 survey showed net revenues of \$52.3 million for the Houston Intercontinental Airport, the accumulated operating surplus generated by the Houston airport system, including Houston Intercontinental Airport, has been used to pay administrative expenses, to meet debt service obligations and to refund outstanding indebtedness and thereby reduce the debt service of the airport system. Over the next five years, the Houston airport system plans to spend about \$812 million on capital improvements.

While the Las Vegas McCarran International Airport generated an operating surplus of about \$66 million, it had debt

service obligations of about \$60 million in 1991. By agreement with the Airlines, the remaining funds have been held for use on new airport capital projects, which are slated to cost about \$600 million by the end of this century.

Finally, at the Seattle-Tacoma International Airport, the airlines have a residual cost *agreement* with the Airport which provides that the operating surplus (\$43.5 million) should be devoted to debt service, coverage requirements and administrative expenses. During the next ten years, this airport expects to spend \$1.3 billion on capital improvements.

In short, after existing debt service and future capital requirements are taken into account, there is no proof that any airports have accumulated "excess revenues" or realized "financial windfalls." Rather, the evidence is that the nation's airports, including Kent County International Airport, have capital needs that vastly exceed their retained operating income.

II. THE ACCUMULATION OF NON-AIRLINE OPERATING INCOME IS CONSISTENT WITH CONGRESSIONAL EXPECTATIONS.

It is the responsibility of state and local airport operators to build, operate, maintain and improve the nation's airports. Congress has required airport operators to set their charges for the use of airport facilities so that each airport is "as self-sustaining as possible." 49 U.S.C. App. § 2210(a)(9). To raise the capital required for airport construction and improvement, it is essential for an airport to generate operating revenues that exceed its operating expenses (that is, in the words of the ATA, to produce "excess revenue"). This so-called "surplus" is necessary to pay debt service, maintain required debt coverage and reserve funds, cover the up-front costs of projects that are eligible for federal grants and permit capital expenditures

on a pay-as-you-go basis.⁴ A ruling that either the AHTA or the Commerce Clause prohibits airports from generating such "excess revenues," even when they only charge the airlines the break-even costs of the airport facilities they use, would cripple the efforts of the nation's airports to be "self-sustaining" and cannot be reconciled with the intent of Congress.

For many years Congress has recognized that it is very difficult for airports to be entirely "self-sustaining" and therefore has provided massive financial assistance through the federal Airport Improvement Program ("AIP"). Airport and Airway Improvement Act of 1982, Pub. L. 97-248, 49 U.S.C. App. §§ 2201 *et seq.*⁵ Even with the AIP, however, Congress has recognized that the nation's airports cannot meet their capital requirements. As a result, Congress enacted the Aviation Safety and Capacity Expansion Act of 1990, Pub. L. 101-508, tit. IX, subtit. B, which amended the AHTA to permit airports to levy "passenger facility charges" ("PFC's") to augment their

⁴The "surplus" challenged by the Airlines is required by federal grant assurances to be used only for airport capital or operating costs. In order to receive federal grants under the Airport Improvement Program, an airport must provide assurances satisfactory to the Secretary of Transportation that "all revenues generated by the airport . . . will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property." 49 U.S.C. App. § 2210(a)(12). Thus, as a matter of federal law any "excess" revenue must be reinvested in the airport. The Secretary has power to enforce this requirement. 49 U.S.C. App. § 2218.

⁵Congress declared that "the continuation of airport and airway improvement programs" is "required to meet the current and projected growth of aviation and the requirements of interstate commerce, the Postal Service, and the national defense." 49 U.S.C. App. § 2201(a)(2). Congress encouraged "airport construction and improvement projects which increase the capacity of facilities to accommodate passenger and cargo traffic, thereby increasing safety and efficiency and reducing delays. . . ." 49 U.S.C. App. § 2201(a)(11). From 1982 to 1992, the Federal Aviation Administration provided AIP grants of about \$13 billion "to help airports sustain or increase their safety and capacity." U.S. Government Accounting Office, Airport Improvement Program, Opportunity to Consider FAA's Role in Meeting Airport System Needs, GAO/T-RCED-93-43 (May 26, 1993), p. 3.

ability to finance approved capital improvement projects.⁶ 49 U.S.C. App. § 1513(e). See H. Rep. No. 581, 101st Cong., 2d Sess. (1990), p. 11 (over the years 1990-1995, airport capital improvement projects are expected to cost \$50 billion).

It is implausible that when it mandated that airports become "as self-sustaining as possible," funded the Airport Improvement Program and authorized the use of PFC's, Congress intended that airports be stripped of the ability to generate the non-aeronautical operating income they must have to raise their own capital and pay required debt service.

III. THE RELIEF SOUGHT BY THE AIRLINES WOULD UNDERMINE THE FINANCIAL INTEGRITY OF THE NATION'S AIRPORTS.

The Airlines seek to compel the Airport to share its non-aeronautical operating surplus with the Airlines even though the Airport has only charged the "break-even" costs of the facilities the Airlines use and the Airlines have not agreed to assume any of the financial risks or obligations of the Airport. This result would be unprecedented and unwise.

Airport operators use two alternative methods to recover the costs of their airports: the "compensatory" method and the "residual cost" method. Under a compensatory method, such as the method used by Kent County, the airport charges commercial aircraft operators only the actual costs of the airport facilities they use; the airport itself retains any excess revenues derived from non-aeronautical sources and has sole responsibility for its own financial obligations and capital planning.

⁶The ATA makes the perverse argument that the adoption of the PFC legislation somehow makes "excess airport revenues . . . uniformly unreasonable" (ATA Brief, p. 12). This broad assertion completely misses the point. Congress reversed federal policy and loosened the constraints of the AHTA to permit the use of a specified form of "head tax" not because it found that existing airport revenues were excessive, but because it found that they were *inadequate* to meet the needs of this country's air transportation system.

Under a residual cost method, the airport and airlines *agree* that the airport will charge the commercial airlines whatever costs of the airport remain unpaid after all non-aeronautical revenues have been collected so that the airport is assured that it will break even overall. In exchange for this financial commitment to make up any revenue shortfalls, the airlines gain the ability to share the airport's concession revenues and to influence its capital planning.

Moody's has summarized the essential differences between these two methods this way:

The fundamental differences between the residual and compensatory approaches . . . are reflected in who assumes the risk for financial operations and who has control over airport capital decisions. Under the residual approach, the airlines assume the risks by guaranteeing annual cash flow sufficient to keep the airport whole regardless of air traffic levels, concession revenue yields, operating expenses, and other financial factors. For this guarantee, airlines share in non-airline revenues in the form of reduced terminal rental and landing fee requirements, and exercise certain controls over capital decisions through MII provisions.⁷ Conversely, under a compensatory approach the airport assumes the risk for financial operations by allocating to airlines only those expenses associated with airline space. Costs associated with concession, public and vacant airline rentable space are presumably funded by non-airline

⁷Majority-in-interest or "MI" provisions typically allow the airlines to disapprove significant capital expenditures. These provisions sometimes allow airlines to veto capital improvements that would aid competitors. Because of this potential for anti-competitive behavior, Congress has provided that MII provisions may not be invoked to restrict the construction of facilities financed with passenger facility charges. 49 U.S.C. App. § 1513(e)(9).

[sic] revenues. By assuming this risk, the airport retains control over capital decisions and retains any excess of non-airline revenues over non-airline expenses.

Moody's on Airports, A New Look at Airport Debt In a Changing Environment (1991), p. 12.

The alignment of financial responsibility with control of the revenue stream is critical because most airports use revenue bonds to raise capital for airport improvement projects (Moody's, p. 7). The authorizing bond ordinances and trust indentures pledge airport revenue, rather than airport facilities, as security for the bonds. To reduce the risk of default, these indentures typically require net airport revenues to be at least 125% of annual debt service and require the funding of reserve accounts to ensure that the pledged revenue stream continues to flow to meet debt service obligations.

In this case, the Airlines seek to mandate an illogical and dangerous combination of the compensatory and residual cost methods which would force the Kent County International Airport to reduce its charges below actual costs whenever it has "excess" non-airline revenues. If the Airlines succeed in their appeal, they will have no financial obligation except to pay below-cost charges for their use of Kent County's airfield and passenger terminal; but the nation's airports will lose the ability to generate the non-aeronautical operating income they require to meet their capital needs.

This result would undermine the financial integrity of the airports throughout the country which rely upon the compensatory method to raise the revenues they need to maintain and improve the air transportation system. If the Airlines are entitled to the Airport's "surplus" non-aeronautical revenue, as they claim, the revenue streams that support the debt obligations of many

of the nation's airports will be threatened.* Such an outcome is not consistent with the intent of Congress or with the precedents of this Court.

This Court has never before outlawed the use of compensatory ratemaking. There is nothing in the AHTA or the Commerce Clause that warrants the relief the Airlines seek. The Secretary of Transportation, who is responsible for the administration of the federal aviation laws, has never suggested in any way that the use of the compensatory method is forbidden. The Airlines' misguided attempt to divert non-aeronautical revenues and destroy the ability of the nation's airports to meet the public's need for a safe and efficient air transportation system should be squarely rejected by the Court.

Conclusion.

For all of these reasons, the Court should affirm the decision of the Court of Appeals and permit the nation's airport managers to continue to use a variety of financial tools, including the compensatory method, to meet their obligations to the public to build, operate, maintain and improve this nation's airports.

Respectfully submitted,

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* The Airlines have never specified how the amount of concession revenues they claim is to be determined. Any requirement that airports reduce their cost-based charges to the airlines whenever they generate income from non-airline sources would, however, inevitably reduce the revenue streams pledged to secure many airport bonds and would, therefore, jeopardize the use of revenue bonds to fund the immense capital improvements required by the nation's air transportation system.

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No. 92-97

Supreme Court, U.S.
FILED

SEP 22 1993

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC. *et al.*,
Petitioners,

v.

COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR NEW HAMPSHIRE, ARIZONA,
CALIFORNIA, FLORIDA, IOWA, MAINE,
MICHIGAN, MONTANA, NEW JERSEY,
NORTH DAKOTA, SOUTH DAKOTA,
AND WISCONSIN AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Congress' exercise of its plenary authority under the Commerce Clause in enacting the Anti-Head Tax Act, which expressly authorizes States to assess certain airport fees, precludes judicial review of the impact of those fees upon interstate commerce under the "dormant" Commerce Clause.

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INTEREST OF THE AMICI CURIAE

New Hampshire, Arizona, California, Florida, Iowa, Maine, Michigan, Montana, New Jersey, North Dakota, South Dakota and Wisconsin have a strong interest in the issues presented in this case. The States write *amici curiae* to support the position that the Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3, is inapplicable to Petitioners' challenge to the Respondents' assessment of various airport service fees. This Court's affirmance of the Sixth Circuit Court of Appeals would foreclose Commerce Clause suits against States in which fees assessed under the Anti-Head Tax Act ("AHTA" or "Act") as well as other federal statutes are challenged.

The States take no position on the Sixth Circuit's determination that the AHTA provides a private cause of action or the Court's findings with respect to the reasonableness of the challenged fees and charges under the Act.

The preclusion of dormant Commerce Clause analysis is of great concern to the States because they assess numerous service, user and licensing fees authorized by federal statutes. These assessments should not be jeopardized by legal challenges brought under the dormant Commerce Clause. Congress, not the courts, is best qualified to resolve the competing interests and issues involved in interstate commerce. *See Quill Corp. v. North Dakota*, 504 U.S. ___, 112 S. Ct. 1904, 1916 (1992). Courts should not conduct an independent analysis of such fees under Commerce Clause principles when Congress has invoked its authority under the Commerce Clause to provide an alternative standard or has authorized States to establish their own independent standards for permissible charges.

The federal statute at issue in this case, the Anti-Head Tax Act, provides specific prohibitions as well as specific authorizations to States and political subdivisions in their assessments upon commercial airline carriers. The Court of Appeals properly determined that, in a challenge to the reasonableness of the fees, a court "should only look at the consistency between

the fees and congressional policy." *Northwest Airlines, et al. v. County of Kent, Michigan, et al.*, 955 F.2d 1054, 1063 (6th Cir. 1992). States, too, should be free to look exclusively to the requirements of federal enabling legislation when assessing congressionally authorized service, user and licensing fees.

This issue is arising with increasing frequency as recalcitrant fee-payers use the Commerce Clause to transform what would otherwise be statutory objections to fee assessments into constitutional challenges.¹ Defending these cases burdens States with the costs of unnecessary litigation and disrupts effective cost recovery in the States' various service and regulatory programs. In addition, the prospect of court-ordered refunds of airport fees, collected in good faith compliance with federal statute but later held to be violative of the dormant Commerce Clause, would imperil the financial viability of the nation's state and local airports. The potential impact of retroactive refunds of other types of regulatory fees on state and local governments would be similarly profound. Moreover, should this Court not expressly affirm the Court of Appeals' ruling, the possibility of obtaining attorneys' fees through Commerce Clause based 42 U.S.C. § 1983 claims is likely to incite an even greater number of such lawsuits.

Accordingly, the *amici* States urge the Court to address the Sixth Circuit's ruling on the Commerce Clause.

¹ Similar claims have been made, for example, in the context of hazardous waste transporter fees which States are specifically authorized to assess so long as the fees are "equitable" and used for certain purposes. 49 USC App. § 1811(b); *American Trucking Associations, Inc. v. New Hampshire*, No. 92-E-604-B (N.H. Super. Ct. Merr. County, filed November 13, 1992).

SUMMARY OF ARGUMENT

The Commerce Clause issue in this case involves Congress' "plenary" power under the interstate Commerce Clause. See *H.P. Hood & Sons, Inc. v. Dumond*, 336 U.S. 525, 542 (1949). The Commerce Clause empowers Congress and has been interpreted by this Court to limit state regulation and taxation of interstate commerce when Congress' power lies "dormant." *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 422 (1946). These "negative implications" of the Commerce Clause present themselves only if Congress has not acquiesced in or prohibited the challenged state laws. Congressional activity, therefore, will disrupt the "dormancy" of the Commerce Clause, *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 214 (1983), and foreclose any Commerce Clause challenge to state regulations.

In this case, Petitioners, seven domestic airline carriers, challenge under the Anti-Head-Tax Act and the Commerce Clause certain service charges assessed against users of the Kent County International Airport.² The Petitioners' Commerce Clause claim was properly dismissed by the District Court, and that dismissal was affirmed by the Sixth Circuit Court of Appeals because the Anti-Head-Tax Act constitutes congressional action pursuant to the Commerce Clause.

The Anti-Head-Tax Act prohibits States from assessing certain "head charges" and expressly authorizes certain other "reasonable . . . service charges . . . for the use of airport facilities." 49 USC App. § 1513. This legislation affecting interstate commerce renders the Commerce Clause no longer dormant with respect to the challenged fees and charges. Congress has, in enacting the provision which authorizes airport service charges and mandates they be "reasonable", clearly provided the con-

² Respondents are the County of Kent, Michigan, the Kent County Board of Aeronautics, and the Kent County Department of Aeronautics.

gressional action required to permit States to act. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

In the presence of clear congressional action authorizing particular state regulations, courts are not free to impose the negative implications of the Commerce Clause. It is only when Congress has not acted under the Commerce Clause that this Court "is the final arbiter of the competing demands of state and national interests." *Japan Line Limited v. County of Los Angeles*, 441 U.S. 434, 454 (1979) (quoting *Southern Pacific Company v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)). This Court previously determined in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 16 (1986) that the AHTA "addresses the issue of 'State taxation of air commerce.'" The AHTA just as surely addresses the issue of state imposition of airport service fees.

Because the AHTA is express and unambiguous in its authorization of airport service charges, it is "unmistakably clear" that Congress intended to grant to the States the power to assess the challenged fees so long as the assessments conform to the federally prescribed standards. See *South-Central Timber Development v. Wunnicke*, 467 U.S. 82, 91 (1984). To construe the AHTA so as to preserve a dormant Commerce Clause cause of action contravenes this Court's prior rulings and defies the statute's express language, congressional intent and ordinary canons of statutory construction. Accordingly, the judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. DORMANT COMMERCE CLAUSE REVIEW IS UNAVAILABLE TO CHALLENGE AIRPORT SERVICE FEES AUTHORIZED BY THE AHTA

The Commerce Clause portion of this case goes to the heart of Congress' authority under that provision. In 1973, Congress enacted the Anti-Head Tax Act, prohibiting state and local gov-

ernments from imposing so-called "head taxes" directly or indirectly on air passengers. See Airport Development Acceleration Act of 1973, Pub. L. 93-44, §7, 87 Stat. 90 (codified as amended at 49 USC App. § 1513). The AHTA additionally provides, however, that "[N]othing in this section shall prohibit [state and local governments] owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities". 49 USC App. § 1513(b). Despite Petitioners' constitutional claim, the Court of Appeals declined to conduct an independent analysis of the challenged fees under the dormant Commerce Clause. It concluded that, in enacting the AHTA, Congress "established clear guidelines for the fees and rates" that airports charge, thus foreclosing dormant Commerce Clause review. *Northwest Airlines*, 955 F.2d at 1063. See *Wardair*, 477 U.S. at 9.

Petitioners and their *amici* argue that the Court of Appeals erred, claiming that "savings clauses" like § 1513(b) "merely limit the scope of federal preemption" and do not evince an intent to approve legislation that would otherwise violate the Commerce Clause. Brief for Petitioners at 42. They also assert that the Sixth Circuit has announced a new standard which "would supplant the dormant Commerce Clause, providing the States with a license to tax and regulate irrespective of any adverse effects on interstate commerce other than those prohibited by each particular regulatory scheme." Brief for American Trucking Associations, Inc. as Amicus Curiae Supporting Petitioners at 18-19.

However, the Sixth Circuit's ruling is neither erroneous nor novel. Rather, it follows directly from a series of decisions of this Court recognizing Congress' "plenary authority" to regulate commerce among the several States. See *Western and Southern Life Insurance Co. v. State Board of Equalization*,

451 U.S. 648, 652 (1981).³ The Court's analysis in these cases begins with the recognition that "the Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body." *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 213 (1983). This Court has prescribed that judicial review of state taxes and regulations is only appropriate under the Commerce Clause "when Congress has not acted or purported to act." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). See Lawrence Tribe, *Constitutional Law* §6-25, p. 479 (2d Ed., 1988) ("Courts assess the validity of state regulations in independent constitutional terms [under the dormant Commerce Clause] only when Congress has not chosen to act.")

In reviewing exercises of Congress' plenary authority, this Court has frequently been called upon to evaluate Congress' intent "to alter the limits of state power otherwise imposed by the Commerce Clause." *Wyoming v. Oklahoma*, 502 U.S. ___, 112 S. Ct. 789, 802 (1992) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (internal quotation marks omitted)). In those instances in which Congress by its actions has "at least acquiesced" in state or local government action, it is not subject to the Commerce Clause no matter what the result of a dormant Commerce Clause analysis would be. *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 12 (1980). In such cases, "it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action." See *Merrion*, 455 U.S. at 154. In fact, as this Court stated in *Wardair*, "[i]t would turn dormant Commerce Clause analysis entirely upside down to apply it when the Federal Government has acted." 477 U.S. at 9.

³ This expansive authority is subject only to the limitations contained in the Constitution, none of which is presented in this case. See *New York v. United States*, 505 U.S. ___, 112 S. Ct. 2406, 2418 (1992).

Petitioners do not explicitly challenge Congress' authority to remove certain state fees from the ambit of the dormant Commerce Clause and provide an alternate standard for their legality. Instead, Petitioners and their *amici* argue that this Court has established a principle that "if Congress means to . . . preclude Commerce Clause review, it must say so expressly and unmistakably." See Petitioners' Brief at 41 n. 50. As will be demonstrated in Sections II and III, *infra*, the AHTA's express terms, as reviewed by this Court in *Wardair*, make clear that Congress intended to displace the dormant Commerce Clause. In addition, even if it is determined that *Wardair* is not by itself controlling, Congress' decision to "affirmatively sanction" the airport service fees manifests Congress' implementation of its authority under the Commerce Clause. The "unmistakably clear" standard relied upon by Petitioners is satisfied where Congress has "affirmatively sanction[ed]" particular state action. See *White*, 460 U.S. at 215. As a result, Respondents' fee assessments do not fall within the purview of the dormant Commerce Clause.

II. THE PLAIN LANGUAGE OF THE AHTA REVEALS THAT CONGRESS DISPLACED THE COMMERCE CLAUSE

A. The Plain Meaning of the AHTA Manifests Congress' Approval of the State-Assessed Fees

The AHTA is unambiguous and express in its terms. The text, in pertinent part, reads:

(a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .

(b) . . . [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 USC App. § 1513.

While conceding that the AHTA is applicable to the contested fees, Petitioners nonetheless urge that the statute's requirements should be augmented with those imposed by the dormant Commerce Clause. Petitioners apparently reason that, while Congress expressly enacted a substantive standard for the assessment and use of rental charges, landing fees and other service charges by government-owned airports, it silently intended that those same fees also be subject to the full implications of the Commerce Clause which apply only when Congress has *not* acted. Petitioners have offered no authority for this argument which is illogical and contrary to the AHTA's express terms as well as this Court's canons of construction.

The plain language of the AHTA eliminates the applicability of the negative implications of the Commerce Clause. This Court has firmly expressed its task to be that of giving effect to the will of Congress, and where "its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, 507 U.S. ____, 113 S. Ct. 1119, 1122, 1123 (1993) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982)). The "plain meaning" rule pronounced by this Court requires that in determining the scope of a statute, courts look first to its language. The "starting point" in a case involving the construction of a statute, or in

"any case involving the meaning of a statute, is the language of the statute itself." *Department of Treasury v. Fabe*, 508 U.S. ___, 113 S. Ct. 2202, 2207, 2208 (1993).

To subject the fees challenged in this case to dormant Commerce Clause standards defies the plain words of the AHTA. Specifically, such scrutiny ignores the "reasonable" requirement of 49 USC App. § 1513(b) and its mandate with respect to the use of fee receipts.⁴ Thus, if the fees are subject to dormant Commerce Clause analysis, the word "reasonable" and the clause, "for the use of airport facilities," become nullities. Such a construction is contrary to this Court's rule of interpretation requiring it "to give effect if possible to every clause and word of a statute." *Gade v. National Solid Waste*, 505 U.S. ___, 112 S. Ct. 2374, 2384 (1992) (quoting *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)).⁵

⁴ At least one federal court has ruled that the § 1513(b) authorization is limited to reasonable fees and charges that "are to be used to operate and maintain the presently existing airport facilities." *City and County of Denver v. Continental Airlines, Inc.*, 712 F. Supp. 834, 840 (D. Colo. 1989) (emphasis added).

⁵ Moreover, should this Court elect to refer to the legislative history of the AHTA, the materials will reinforce its reading of the statute's "plain language." See *United States v. Texas*, 507 U.S. ___, 113 S. Ct. 1631, 1636 (1993). The conference committee's report on the AHTA reveals that there was no question that Section 7 of the Senate bill was intended to allow for the continued levy and collection of reasonable rental charges, landing fees, and other service charges for the use by airlines of airport facilities. Conf. Rep. No. 93-225, 93rd Cong., 1st Sess. (1973). The conference committee's report states:

The Senate bill also provided that the prohibition would not extend to the levy or collection of other taxes, such as property taxes, net income taxes, franchise taxes, and sales or use taxes, nor to the levy and or collection of other charges such as reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Id., reprinted in 1973 U.S. Code Congressional and Administrative News, p. 1434, 1458.

In addition to lacking any support in the statute's plain terms or this Court's canons of statutory interpretation, the construction of the AHTA proffered by Petitioners would be impracticable to apply. In fact, such a construction would create immediate and unavoidable uncertainty as to whether the Commerce Clause or the AHTA effects the more exacting standard.⁶

Petitioners have attempted to cast this Court's holding in *Wardair*, 477 U.S. 1, as prescribing dormant Commerce Clause review in the instant case. However, that decision relies on the plain language of the AHTA and conclusively demonstrates that it was Congress' choice that the AHTA alone control the legality of airport service fees.

B. The AHTA Addresses The Assessment of Airport Service Charges

This Court all but decided the instant issue in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986), its most recent interpretation of the AHTA. In a challenge brought by foreign airlines to Florida's aviation fuel sales tax, this Court determined that "the Act expressly permits States to impose such taxes." *Id.* at 6. The Court went on to consider the dormant Commerce Clause issue separately from the AHTA only because the AHTA did not reveal if Congress intended this permission to extend to the imposition of a sales tax on foreign, as opposed to domestic, carriers.

It is, of course, plausible that Congress never considered whether States should be permitted to impose sales taxes on foreign, as opposed to domestic, carriers,

⁶ Petitioners and their amici assert that the AHTA presents the "stricter" standard, but nonetheless seek application of the Commerce Clause. See Petitioners' Brief at 21; American Trucking Associations, Inc. Brief at 8, n. 5, 19-20.

and therefore we do not rely on the existence of this section to answer the Commerce Clause issue raised here by appellant and considered by us below.

Id. at 7 (emphasis added). The evident implication of this Court's explanation is that such a reference would have foreclosed Commerce Clause review.⁷

Ultimately, this Court concluded that, even without considering the AHTA, it did not "confront federal government silence of the sort that triggers dormant Commerce Clause analysis." *Id.* at 9. The Court reviewed a number of inter-governmental agreements providing exemptions to foreign air carriers from "national duties and charges" and concluded that "the facts presented by this case show that the federal government has affirmatively decided to permit the States to impose these sales taxes on aviation fuel." *Id.* at 12.

This Court opined that, with respect to the power of the States to tax aviation fuel, "the case does not call for dormant clause analysis at all." *Id.* From the "negative implication[s]" of the federal actions, this Court determined that the United States had "at least acquiesced" in state taxes of fuel used by foreign carriers in international travel. *Id.* Thus the federal government had chosen "not to preclude local taxation." *Id.* See *Merrion*, 455 U.S. at 154. Under this Court's analysis, the statutory reservation to the States to assess sales taxes, together

⁷ In his concurring opinion in *Wardair*, Chief Justice Burger was troubled by the Court's decision to proceed with a Commerce Clause analysis:

By refusing to decide this case solely on the express language of 1513(b) and instead entering the cloudy waters of this Court's 'dormant Commerce Clause' doctrine the Court fails to honor the choice already pointedly made by Congress following its extensive consideration of the problem of state taxation in this area.

Id. at 17.

with the absence of any congressional proscriptions against such taxation of foreign carriers ended the dormant Commerce Clause inquiry.

The AHTA's authorization of the imposition of reasonable service charges provides an even greater articulation of congressional intent. As Chief Justice Burger noted in his concurrence in *Wardair*, "there is nothing dormant" where Congress has identified particular taxes and authorized their imposition. *Id.* at 13.⁸ There is uncertainty neither as to what charges may be imposed nor upon whom they may be levied. Here, domestic airlines challenge landing fees, terminal building rental rates and amortization fees, all authorized by the AHTA. Through explicit reference in § 1513(b), Congress expressly permits government-owned airports to charge "reasonable rental charges, landing fees and other service charges . . . for the use of airport facilities." Therefore, in addressing reasonableness challenges brought by domestic airlines, courts may in fact "rely on the existence of this section" to foreclose Commerce Clause review. 477 U.S. at 7.

In its earlier consideration of the AHTA, this Court found little doubt as to the statute's purpose. In *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983), the Court

⁸ Justice Burger's opinion anticipated this very case. The Chief Justice commented:

Just as we need not look beyond the plain language "when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry effecting interstate commerce," *Aloha Airlines*, 464 U.S. at 12, we need not look beyond the plain language of a federal statute which unambiguously authorizes the States to impose a particular kind of tax. Section 1513(b) authorizes state sales taxes on goods when used in air commerce. While Congress has not explained exactly why it made the distinction between taxes prohibited under § 1513(a) and those permitted under § 1513(b), "Congress chose to make the distinction and the courts are obliged to honor this Congressional choice." 464 U.S. at 12 n. 6.

477 U.S. at 17.

construed 49 USC App. § 1513(a) to preempt Hawaii's imposition of a gross income tax on airlines. Notwithstanding Hawaii's efforts to cast its tax as "a means of taxing the [airline's] personal property," the plain language of the federal statute mandated its invalidity. When a congressional act "unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted." 464 U.S. at 12. This Court considered itself "bound by the plain language of the statute." *Id.* at 16, n. 10. Given Congress' clear "authority to regulate state taxation of air transportation in interstate commerce," there was no question about the applicability of the statute. *Id.*, (citing *Arizona Public Service Co. v. Sneed*, 441 U.S. 141, 150 (1979)).

This Court noted that in the AHTA Congress chose to prohibit certain assessments and to specifically authorize others. Because the statutory designations are quite clear, courts are "obliged to honor this congressional choice." 464 U.S. at 13, n. 6. What is true of statutory proscriptions is equally true of statutory authorizations. To employ this Court's language in *Aloha Airlines* for purposes of the instant case, the Court of Appeals would have "erred in failing to give effect to the plain meaning of" § 1513(b) had it ignored the service fee authorization and allowed Petitioners to maintain a dormant Commerce Clause claim. *Id.* at 12.

C. The Sixth Circuit Ruling Comports With Other Federal Court Decisions In Airport Service Fee Cases

Since this Court issued its decision in *Aloha Airlines*, several lower federal courts have applied the AHTA in actions challenging airport fees. These cases further demonstrate that the AHTA provides an unmistakable manifestation of congressional intent to supplant the Commerce Clause.

Most recently, in a case where it considered administrative and judicial challenges to an airport landing fee scheme under the AHTA and the Airport and Airway Improvement Act of 1982, 49 USC App. § 2210, the First Circuit determined that no "constitutional test" was applicable. *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 174 (1st Cir. 1989). The Court of Appeals declined to review the challenged fees under the Commerce Clause standard articulated in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), because such a review would be "inconsistent with the extensive and preclusive regulatory scheme for a uniform national aviation system. . . ." 883 F.2d at 174. The inconsistency lies in the attempt to apply broad constitutional principles to a fee program for which Congress has provided particular statutory standards. *Id.* The First Circuit determined that "[W]here 'specific congressional action' is the source of the contention, we look to that source in determining whether it preempts the local legislation." *Id.* (citing *New Orleans v. Dukes*, 427 U.S. 297, 304 (1976); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 154-55.)

Earlier, in *Indianapolis Airport Authority v. American Airlines, Inc., et al.*, 733 F.2d 1262 (7th Cir. 1984), the Seventh Circuit found that the AHTA's reasonableness standard provided sufficient guidance in adjudicating the legality of airport service charges. The Court of Appeals noted that "reasonableness is not defined, but the statute has a history and a context that enables us to give meaning to the term." *Id.* at 1265. The Court of Appeals also addressed the availability of Commerce Clause review. Relying on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Seventh Circuit dismissed the dormant Commerce Clause claim and stated that rates should be reviewed only to determine if "they are consistent with the congressional policy." 733 F.2d at 1266. Thus, irrespective of their ultimate determination as to the reasonableness of the various fees assessed under the AHTA, courts have uniformly concluded that the dormant Commerce Clause has no place in the

debate. See also *City and County of Denver v. Continental Airlines, Inc.*, 712 F. Supp. 834, 838-840 (D. Colo. 1989); *Island Aviation, Inc. v. Guam Airport Authority*, 562 F. Supp. 951, 959 (D. Guam 1982).

Accordingly, as this Court's decision in *Wardair* portends, the clear language of the AHTA displaces the dormant Commerce Clause and authorizes the assessment of fees at issue in this case.

III. THIS COURT'S DETERMINATIONS OF CONGRESSIONAL AUTHORIZATION IN THE AREA OF INTERSTATE COMMERCE SUPPORT THE CONCLUSION THAT THE COMMERCE CLAUSE IS INAPPLICABLE TO FEES AUTHORIZED BY THE AHTA

Although the States maintain that *Wardair* and the plain language of the AHTA provide an ample basis to affirm the judgment of the Sixth Circuit, this Court's decisions in other Commerce Clause cases provide further support for the conclusion that the dormant Commerce Clause is inapplicable to fees that have been assessed pursuant to the AHTA. Over the past dozen years this Court has on several occasions confronted the question of whether a particular congressional action or inaction constituted the requisite authorization to States to burden interstate commerce. A review of these decisions confirms that the Court of Appeals correctly interpreted the AHTA in the instant case.

A. The AHTA Expressly Reserves To The States Authority To Charge Reasonable Fees

In its *amicus* brief, American Trucking Associations, Inc. ("ATA") relies upon several decisions in which this Court did not find sufficiently "clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate com-

merce. . . ." See ATA Brief, at 8-10. In each of these cases, this Court determined that the legislation relied upon by the States to immunize the state acts from Commerce Clause attack, instead limited only the extent of federal preemption. In each statute considered, Congress inserted "savings clauses" to preserve state authority in matters not federally regulated, but did not "affirmatively sanction" any state action. The statutes preserved only the balance of the State's otherwise valid regulatory power, in relation to the specific federal preemption.⁹

For example, in *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), this Court evaluated whether § 201(b) of the Federal Power Act, 16 U.S.C. §§ 792 *et seq.*, permitted States to prohibit the exportation of hydroelectric power from within their borders. That subsection provided that a preceding section, conferring exclusive interstate jurisdiction upon the Federal Power Commission,¹⁰ "shall not . . . deprive a state or state commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a state line." This Court determined that Congress had not affirmatively granted power to the States, but had only left standing "whatever valid state laws then existed. . . ." *Id.* at 341. The reservation to the States contained in the Federal Power Act authorized neither particular rate levels nor any rate-making methodology.

Similarly, in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), this Court declined to find that a section of the Bank Holding Company Act, 12 U.S.C. § 1842, which provided that States are to retain "such powers and jurisdiction" over

⁹ ATA's argument would have merit were the government relying on 49 USC App. § 1305(b) to justify the instant fees. That provision, which is also a part of the Federal Aviation Act, reserves to the States "the authority . . . to exercise its proprietary powers and rights," and is more properly analogized to the statutes at issue in the savings clause cases.

¹⁰ Now the Federal Energy Regulatory Commission.

banks which they currently or may thereafter have, authorized States to exclude out-of-state, non-bank financial services businesses. *Id.* at 49. This Court construed this statute as it had the Federal Power Act, finding no statutory basis to conclude that Congress had reserved to the States the additional authority to regulate non-banking businesses, without being subject to the dormant Commerce Clause.

The same result was reached by this Court with respect to Congress' general reservation of authority to the States over water law. In *Sporhase v. Nebraska*, 458 U.S. 941 (1982), this Court evaluated parts of the Reclamation Act of 1902, 32 Stat. 390, which, like other federal statutes regulating certain aspects of ground water usage, provided that "nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any state or territory relating to the central appropriation, use, or distribution of water used in irrigation." *Id.* at 959. The Court determined that neither this language, nor that of another provision of the Act directing the Secretary of the Interior to conform his acts to state law, indicated "that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 960.

Thus, although the prefatory language in the savings clause cases is similar to that in § 1513(b), the matters referenced are significantly different than those set forth in the AHTA.¹¹ None

¹¹ In one of this Court's more recent applications of its standards for identifying the requisite Congressional authorization, this Court was again confronted with the Federal Power Act's "savings clause." *Wyoming v. Oklahoma*, 502 U.S. —, 112 S. Ct. 789 (1992). The statute, 16 U.S.C. § 824(b) (1), reserves retail rate-making authority to the state, but does not identify specific energy sales subject to state regulation or set forth permissible rate-making standards. In this case, as in earlier ones, it is apparent from the "plain terms" of the statute that "Congress did no more than leave standing whatever valid state laws then existed" in the regulated area. *Id.* at 802 (citation omitted). Clearly, only otherwise "lawful" state authority was thus preserved.

of these decisions controls the case at bar because the AHTA presents a far more affirmative reservation.

Under the AHTA, the power to charge a specific type and quality of fee is reserved to the States. Congress expressly reserves to governmental entities owning airports the specific authority to assess "reasonable rental charges, landing fees, and other service charges . . . for the use of airport facilities." 49 USC App. § 1513(b) (emphasis added).¹² The fact that the authorization is phrased as a "savings clause" is of no significance. Congress authorized the levy of particular charges and provided the qualitative standard for their proper imposition.¹³ Nothing is thus "saved" to "otherwise valid" state law. Congress has in effect "struck the balance it deems appropriate" with respect to such airport fees. *See Merrion*, 455 U.S. at 154. Courts must uphold federal statutes so long as the activity which Congress has chosen to regulate or to leave open to state regulation arguably is related to, or has an effect on, interstate commerce. *See*, 2 Ronald D. Rotunda, *Treatise on Constitutional Law*, § 11.5 (1992). When such action is taken by Con-

¹² In his Amicus Brief on Petition for Writ of Certiorari, the Solicitor General argues that Congress did not intend to regulate airport service fees through its enactment of the AHTA, but intended only to set forth the types of taxes and charges which States are prohibited from imposing on air commerce and those which States are *not* prohibited from imposing. *See* Brief for United States at 11. While the Solicitor General maintains that other federal statutes, *see* footnote #15, *infra*, regulate the challenged fees, the States and the Solicitor General agree that "Congress has explicitly and unambiguously addressed the subject of airport fees and rentals charged to all airport users." U.S. Brief at 19.

¹³ The AHTA limits the authorized fees to those for airport use and requires that the fees be reasonable. 49 USC App. § 1513(b). Implicit in this Court's holding in *Wardair*, however, is the conclusion that the authorization to assess service charges, standing alone, will remove any Commerce Clause issue, even absent the additional requirements of § 1513(b). Thus, whether the authorization is unconditional or qualified is of no consequence.

gress, "courts are not free to review state taxes or other regulations under the dormant Commerce Clause." 455 U.S. at 154.

B. This Court Has Inferred A Congressional Desire To Displace The Commerce Clause When Necessary To Effectuate A Statutory Purpose

This Court has also found the requisite authorization to States in a number of cases where Congress through various means has "affirmatively sanction[ed]" certain designated state acts. See *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983). These affirmative designations have, either by inclusive language or inescapable logic, indicated a congressional approval of the particular state action challenged under the Commerce Clause.

For example, in *Merrion*, 455 U.S. 130, petitioners challenged the Indian tribe's severance tax which applied to some but not all oil and gas extractions. Relying on *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 421-427 (1946), this Court determined that "by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect," Congress had "affirmatively acted" with respect to the challenged tax, thereby obviating the need for Commerce Clause judicial review. 455 U.S. at 155. The Court held that, unlike cases involving state taxes for which specific federal approval is not required, Commerce Clause review of the Indian tax measures was unnecessary because it "would duplicate the administrative review called for by the congressional scheme." *Id.* at 156. Likewise, judicial review under the Commerce Clause would duplicate the review required by the substantive "reasonable" standard of the AHTA.¹⁴ Just as where Congress has provided

¹⁴ The Solicitor General argues that the issue of "reasonableness" under the AHTA should be addressed by the Secretary of Transportation in the first instance. See Brief for United States as Amicus Curiae at 9-16.

an "administrative process" to monitor state governmental acts, where it has provided a comprehensive regulatory scheme within which particular assessments are reserved to state determination, courts should limit their review to compliance with the specific statutory requirements. 455 U.S. at 155.¹⁵

Similarly, in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), this Court noted that the Commerce Clause is "not a restriction" on Congress' authority, and, to the extent Congress authorizes expenditures by state and local governments, the expenditures are not subject to the dormant Commerce Clause even if they "interfere[] with interstate commerce." *Id.* at 213. In *White*, federal regulations directing that certain federal funds be expended in programs provided for persons "residing in the area" authorized discriminatory state action undertaken in conformance thereto. 24 C.F.R. § 135.1(a) (2) (i) (1982). As a result of this specific congressional authorization, the Mayor's executive order that construction projects be performed by a work force consisting of at least half Boston residents did not present a dormant Com-

¹⁵ The parties concur that Congress has provided such a scheme here. Petitioners and Respondents agree that the AHTA must be read in conjunction with other portions of the Federal Aviation Act, of which it is a part, as well as the Airport and Airway Improvement Act of 1982, 49 USC App. § 2201 et seq. See Brief of All Respondents in Opposition to Petition for Writ of Certiorari, at 10; Brief for Petitioners at 29, n. 33.

merce Clause issue. *Id.* at 213.¹⁶ The congressional authorization contained in the AHTA is clearer still, as it is "expressly stated." See *Wunnicke*, 467 U.S. at 90.

C. Unequivocal congressional Language Authorizing State Action Will Be Given Broad Effect

This Court has evaluated "unequivocal language" similar to that found in the AHTA in its cases involving the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* In *Western and Southern Life Insurance Co. v. Board of Equalization*, 451 U.S. 648 (1981), this Court applied the holding of *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), in rejecting the insurer's challenge to California's retaliatory insurance tax. The Court held that the language of the McCarran-Ferguson Act made clear that discriminatory state insurance taxes may not be challenged under the dormant Commerce Clause. Section 1 of the Act states:

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the

¹⁶ Conversely, the requisite certainty was found to be lacking in the congressional action reviewed in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). There, contrary to Alaska's urging, this Court determined that Congress' historical "primary manufacture" requirement for timber taken from federal lands was an insufficient basis upon which to support an inference that it intended to authorize a similar policy with respect to state lands. Thus, although federal policy was clear, there was no evidence in the federal statute and regulations of a "congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause." *Id.* at 90 (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (internal quotation marks omitted)). In *Wunnicke*, this Court determined that a mere inference from an analogous or parallel federal law was insufficient to manifest congressional intent with respect to state law. *But see Wardair*, 477 U.S. 1. No such inferences need be drawn to find the requisite congressional authorization in the instant case.

part of Congress shall not be construed to impose any barrier to the regulation or taxation of such businesses by the several States.

15 U.S.C. § 1011.

The statutory language makes manifest congressional intent. Congress' inaction, which ordinarily would subject such state action to the negative implications of the Commerce Clause, was recast to nullify this assumption. By this designation, Congress, without express reference, removed the Commerce Clause from any consideration of state insurance regulation and taxation.¹⁷ In determining that Congress had displaced the Commerce Clause, the Court relied upon the unambiguous inclusiveness of state regulatory authority provided under the federal Act.

Similarly, in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985), this Court again considered statutory language which it determined "plainly permits" the challenged state legislation. *Id.* at 169. The Douglas Amendment of the Bank Holding Company Act prohibits the Federal Reserve Board from approving interstate bank acquisitions unless the acquisition "is specifically authorized by the statute laws of the state in which such bank is located by language to that effect and not simply by implication." 12 U.S.C. § 1842(d). This Court held that state statutes "which selectively authorize interstate bank acquisitions on a regional basis" were plainly authorized by the Douglas Amendment. The Court concluded its brief discussion of the Commerce Clause claim by noting that "when Congress so chooses, state actions which it plainly contemplated are invulnerable to

¹⁷ Ironically, if Congress were required, as Petitioners assert, to expressly state its intention to displace the Commerce Clause, there would be little need for the judicial principles announced in the cases discussed in this Section.

constitutional attack under the Commerce Clause." *Id.* at 174. The AHTA's service fee authorization renders the instant assessments similarly invulnerable.

Because Congress' authority under the Commerce Clause is plenary, it includes within it the "power to regulate free trade as well as burden it, to encourage commercial intercourse or to prohibit it." Julian N. Eule, "Laying the Dormant Commerce Clause to Rest," 91 Yale L. J. 425, 434 (1982). When Congress chose to authorize States to assess airport service charges, it exercised that authority, expressing its will as to a particular matter of interstate commerce. Therefore the Court of Appeals correctly found that Commerce Clause review is foreclosed by the express terms of the AHTA.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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13
No. 92-97

Supreme Court, WA.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., *et al.*,
Petitioners,
v.

COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**BRIEF OF THE AIRCRAFT OWNERS AND
PILOTS ASSOCIATION AS *AMICUS CURIAE*
SUPPORTING RESPONDENTS**

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NORTHWEST AIRLINES, INC., et al.,
v. *Petitioners.*

COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

**BRIEF OF THE AIRCRAFT OWNERS AND
PILOTS ASSOCIATION AS AMICUS CURIAE
SUPPORTING RESPONDENTS**

The Aircraft Owners and Pilots Association (AOPA) respectfully submits this brief as *amicus curiae* supporting affirmance of the judgment below. Letters reflecting the consent of Petitioners and Respondents to the filing of this brief are filed contemporaneously herewith.

STATEMENT OF INTEREST OF AMICUS CURIAE

AOPA is the world's largest organization of individual aircraft owners and pilots engaged in the non-carrier segment of aviation known as "general aviation." General aviation, in terms of the numbers of aircraft and hours flown, is significantly larger than either the air carrier or

military segments of aviation in the United States.¹ AOPA is a nationwide, non-profit association of 316,000 members who own a majority of the active general aviation aircraft in the United States and account for over half of the total hours flown in the nation's airspace. One of AOPA's primary purposes is to represent the interests of general aviation before the federal and state legislatures, courts, and regulatory agencies. AOPA brings to the Court a knowledge of airport operations and regulation affecting the non-carrier aviation community, as well as general aviation's concerns for maintaining the overarching federal aviation policy of fair access to the nation's airports and airspace without unreasonable restrictions for all classifications or categories of aviation.

The instant case presents issues of major significance for continued reasonable general aviation access to approximately 578 airports of all sizes throughout the United States serving scheduled and unscheduled air carrier and general aviation traffic. FAA Airport Activity Statistics of Certificated Route Air Carriers, Calendar Year 1991, at v. Thousands of AOPA's members reside in Michigan and neighboring states. They and other AOPA members reasonably may be expected to utilize the Kent County International Airport either on a regular or itinerant basis. They have a vital pecuniary interest in the fee structure for air operations facilities and services. More importantly, the Court's opinion will undoubtedly have a direct precedential impact on the gen-

¹ *E.g.*, in 1989, air traffic at U.S. airports with traffic control towers consisted of 87,713,390 general aviation operations; 20,841,117 air carrier and air taxi operations; and 2,767,457 military operations. An "airport operation" is defined as an "aircraft takeoff or landing." Federal Aviation Administration (FAA) Statistical Handbook of Aviation, Calendar Year 1989, at 2-15, G-2. At that time, 219,737 general aviation aircraft were in use, as compared with 5,778 air carrier aircraft of all types. General aviation pilots flew 35,012,180 hours in 1989, while air carrier flight time totaled 12,687,535 hours. *Id.* at 5-4, 5-7, 5-8, 5-5.

eral aviation user fee methodology of airports in every section of the country. Indeed, since general aviation users at Kent County Airport were not party to the proceedings below, the views of AOPA as expressed in this brief are essential for a balanced, objective review of the issues presented.

The resolution of this case could have a profound impact on general aviation user fee schedules, and thus on the continuing access of general aviation aircraft, without undue restrictions, to airports across the United States. AOPA is eminently qualified to represent general aviation interests in this regard.

SUMMARY OF ARGUMENT

Petitioner airlines assert, in part, that Kent County International Airport discriminates unjustly under the Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513 (1988 & Supp. III 1991), and the Interstate Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, in favor of general aviation² with respect to the assessment of fees for air operations facilities and services—such as runway and taxiway maintenance, airport lighting, ice and snow removal, and navigational aid services. These claims are not supportable in fact or as a matter of law.

1. As long as user fees for a particular class of aviation—commercial air transport carriers or general aviation—are reasonable in relation to the airport's actual cost of providing air operations services to that user, the AHTA provides no legal basis for one user class to challenge the charges levied upon the other aviation category.

² Based on evidence at trial, the District Court found that general aviation for purposes of this litigation comprises "corporate aircraft and privately owned aircraft that are not in commercial, passenger, cargo, or military service." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. 1112, 1114 (W.D. Mich. 1990).

The AHTA was enacted to prohibit local taxation of either the right of aircraft operators to engage in air commerce or of air passengers to travel by air transportation. Congress believed such taxation was in conflict with the comprehensive federal system of airport regulation and development assistance, as well as inhibiting to the growth of a vital U.S. air transportation system. The statute, however, preserved an airport's ability to charge aviation users for operational services provided, subject only to the limitation that user charges are reasonable, *i.e.*, not excessive in relation to the airport's actual cost of providing such services to a particular user.

It would be a serious mistake for the Court to interpret the AHTA to reach beyond this originally-intended purpose to impose a requirement that each aviation class must in all circumstances pay, through airport user fees, the full 100 percent of costs allocated to that user category for airside services. By thus depriving local airports of the flexibility, for valid economic and policy reasons, to fund some portion of the air operations cost allocation to either or both aviation classes, the decision of the Court in this case could greatly impair the U.S. policy of airport and airway access to all segments of aviation without unreasonable restriction. Moreover, the Court should refrain from infringing upon the prerogatives of the Secretary of Transportation, who is required and entrusted in the first instance to balance federal aviation policy interests to ensure that airports receiving federal development funds are "available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. § 2210(a)(1) (1988). *See also* Brief for the United States as *Amicus Curiae* in Opposition to Petition for Writ of Certiorari at 14-16.

2. In the event the Court should grant Petitioners' claim of Commerce Clause applicability in this case, it is essential that the Court correct the misimpression that general aviation, as a matter of fact, is essentially intra-

state commerce. Moreover, this Court in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 718-19 (1972), previously acknowledged that an airport may make rational distinctions between commercial and general aviation in assessing fees for air operations services without placing an undue burden on interstate commerce.

ARGUMENT

I. THE ANTI-HEAD TAX ACT DOES NOT PROVIDE GROUNDS FOR ONE CLASS OF AVIATION USER TO CHALLENGE AIRPORT FEES LEVIED UPON ANOTHER AVIATION USER CLASS.

AOPA supports Petitioner airlines' view that fees for the privilege of doing business at an airport levied upon non-aeronautical concessions—such as restaurants, parking lots, car rental agencies, airport shops, and advertisers—must be used, along with all airport revenues generated from other users, to fund airport operations, maintenance, development, and other aviation-related functions. The Airport and Airway Improvement Act of 1982 demands that an airport like Kent County International, which receives federal development funds, maintain a fee structure for airport users that will make the airport self-sustaining. All revenues generated by an airport must be expended only for airport-related operations and capital improvement. 49 U.S.C. App. §§ 2210(a)(9) & (12) (1988).

AOPA's objection to Petitioners' argument under the Anti-Head Tax Act, 49 U.S.C. App. § 1513 (1988 & Supp. III 1991), is the erroneous proposition that the AHTA's proscription on unreasonable user charges for aircraft operators enables one category of aircraft operator to raise claims of unjust discrimination with regard to airport fees applied to another distinct and dissimilar category of aviation users.

Along with the Seventh Circuit Court of Appeals in *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984), Petitioners appear to have overlooked the purpose of the AHTA and focused not on the operative language and intent of the statute, but rather on its exclusionary provisions. The intent of Congress in enacting the AHTA—following on the heels of *Evansville-Vanderburgh Airport*—was to ensure that air passengers are taxed at a uniform rate by the Federal Government and not subject to various direct or indirect taxes on air travel levied by state and local governments, without any assurance that revenues generated would be earmarked for airport development. Such local taxation would inhibit the flow of interstate commerce and retard the growth of air transportation. S. Rep. No. 12, 93d Cong., 1st Sess. (1973), reprinted in 1973 U.S. Code Cong. & Ad. News 1434, 1434-35, 1446. Nowhere in either the Senate or House of Representatives reports on the legislation by which 49 U.S.C. App. § 1513 was enacted is there indication that Congress considered landing, parking, or fuel flowage fees to be excessive generally at U.S. airports, or that airline and general aviation user charges were unjustifiably disproportionate. *Id.* at 1973 U.S. Code Cong. & Ad. News 1434; H.R. Rep. No. 157, 93d Cong., 1st Sess. (1973).

The AHTA's limitation on unreasonable aircraft operator user fees, 49 U.S.C. App. § 1513(b) (1988), was meant only to clarify that Congress did not intend for its prohibition of any "tax, fee, head charge, or other charge" on persons traveling in air commerce or the sale of air transportation, 49 U.S.C. App. § 1513(a) (1988 & Supp. III 1991), to be interpreted to include *bona fide* fees for actual airport services provided to aircraft operators. The statute thus gives an aircraft operator a basis to claim that airport fees charged to *that particular operator* are unreasonably high or arbitrary in relation to the airport's actual costs in supplying airside facilities and services.

The AHTA was not meant to serve as the standard for comprehensive review of an airport's overall user fee schedule to ensure complete equity among all types of users. That is a function, in the first instance, of the Secretary of Transportation, with whom rests the statutory responsibility to balance the competing interests of all airport users in furtherance of the overriding federal aviation policy and mandate that airports "be available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. § 2210(a)(1) (1988).

General aviation certainly does not object to paying its properly allocated share of the cost of air operations facilities, equipment, and services. It would be unfortunate, however, should the Court interpret the AHTA so as to prevent an airport from assessing a particular aviation user class less than the maximum charges reasonably permissible, so long as another class of aviation user is not required to make up the difference. Many valid economic and local governmental policy reasons might be served by an airport operator's decision to fund some portion of operational costs attributable to a particular aviation user class, including the airlines, from non-aeronautical airport revenues.

There would be no basis for complaint under the AHTA, for example, if an airport funded the entire cost of airside facilities and services from other revenues or public funds. A municipality might desire to foster the development of aviation-related industry in the local area. Alternatively, an airport proprietor might wish to charge commercial aviation less than its full operational costs in order to encourage the establishment or expansion of airline service for residents of the community. In such case, general aviation would have no complaint under the AHTA—so long as general aviation was not required to pay more than its fair allocation devised under a methodology properly reflecting the actual cost of servicing

general aviation and not designed intentionally to make airport access to non-commercial aircraft financially prohibitive.

Similarly, Petitioner airlines should not complain that, at no expense or detriment to the airlines, an airport refrains from charging general aviation its total share of the cost of airside operations. The revenues raised by general aviation user fees may not justify their administrative collection costs. Conversely, increased fees may, in fact, reduce airport revenues by causing aircraft owners and pilots to obtain aviation fuel, supplies, repairs, and services at other airports. Moreover, as Chief Judge Merritt noted in his dissent from the Circuit Court's decision below to deny a rehearing *en banc*, "[a]s a matter of policy, most regional airports want to keep some general aviation on the field for a variety of reasons. The general aviation fleet, the number of new pilots and other similar statistics are in serious decline." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 955 F.2d 1054, 1066 (6th Cir. 1992). General aviation supports a significant industry of aircraft mechanics; flight instructors; and suppliers of aviation supplies, parts, and services. It also provides local communities with aircraft and aviators for life-saving emergency, rescue, and humanitarian aid transport; police, fire, and traffic patrols; agricultural services; and untold other aerial activities. See, e.g., Trial testimony of Robert A. Ross, Director of Aeronautics at Kent County Airport (Ross Testimony), at 697-702 (describing the nature of general aviation activities at the airport).

The test for compliance with the AHTA thus should be: (1) does the contested fee purport to tax air travel, or is it facially a valid charge for airport services; and (2) if the latter, is the fee arbitrary, capricious, or unreasonable in relation to the airport's actual cost of providing such services to the complaining aviation user

class. As characterized by Senior Circuit Judge Contie below:

The Airlines do not contend that the fees charged them for their airside operations costs are arbitrary or capricious and concede that the fees are based on the actual break-even costs calculated on the basis of aircraft weight and number of landings. Because the fees charged to the Airlines for their airside operations have a reasonable relationship to the actual costs incurred, they are reasonable within the meaning of the Anti-Head Tax Act.

955 F.2d at 1065. Cf. *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 170 (1st Cir. 1989) (evaluating alleged AHTA violation by focusing first on the *nature* of the contested fee as either a tax on air travel or an operating expense).

Petitioner airlines do not contest the airport's method of allocating the cost of air operations between the air carrier and general aviation users.³ Petitioners' argument is that the airlines are assessed 100 percent of their allocated share, while general aviation users are required to pay less than their full allocation. Establishment of a requirement to collect the full general aviation allocation from user fees levied upon general aviation aircraft operators, however, would not necessarily put money back in the pockets of the airlines or their passengers. The air-

³ AOPA does not necessarily accept, as a matter of fact, the accuracy of Kent County Airport's allocation of airside operations costs as between the airlines and general aviation. The allocation itself appears to be weighted disproportionately against general aviation. It fails to reflect that, were it not for the presence of the airlines, the airport might not require its lengthy runway and taxiway network; sophisticated lighting system and navigational equipment; airport security system; runway safety areas and fencing; extensive airport infrastructure; crash, fire, and rescue services; ice and snow removal capabilities; and other facilities, equipment, and services unnecessary for most general aviation operations. See Ross Testimony at 655-84; 14 C.F.R. pt. 139 (1993).

port applies other airport revenues obtained from non-aeronautical concessionaire fees to cover the general aviation "shortfall" and help defray the significant expense of airside operations. If general aviation operators were assessed their full allocation, the airport still could require the airlines to pay 100 percent of their properly allocated share. 955 F.2d at 1064-65. This Court's acceptance of Petitioners' discrimination claim would merely result in potentially significant increases in airside user fees for general aviation aircraft, with no corresponding savings to the airlines, at the many airports across the country that serve both categories of aviation users.

Petitioners assert that the airlines are harmed because concession revenues applied toward the general aviation portion of airside operations could conceivably be used to purchase airport improvements or additional equipment. They also claim airline ticket revenues would increase if concession fees, which are passed on to airline passengers, were not used to defray general aviation's share of operational expenses. Brief for Petitioners at 38. At the very heart of this lawsuit, however, is Petitioners' objection that the airport amasses surplus revenues far in excess of current and reasonably foreseeable future operating costs. Moreover, there has been no indication or reason to suppose that elimination of the airport's support for general aviation would prompt it to institute a corresponding reduction in concession user fees. Concession fees are established on the basis of traditional market principles. By charging general aviation its total allocated share, the airport would only increase its contingency fund coffers with no added benefit to the airlines or savings for their passengers.

Petitioners claim also that, to the extent the airlines and general aviation are competing modes of travel, the undercharging of general aviation for airside operations puts the airlines at a competitive disadvantage. *Id.* The District Court below found, however, that general aviation

at Kent County Airport is comprised of corporate and privately-owned aircraft not involved in the carriage of passengers for hire as a commercial enterprise. 738 F. Supp. at 1114. Moreover, travel by general aviation aircraft, as opposed to the airlines, is more likely chosen for reasons primarily unrelated to relative cost, such as business necessity or convenience, pursuit of an aviation avocation, personal transportation, or lack of scheduled airline service to remote or less populated destinations.

The commercial airlines and general aviation are unique classes of aviation users often involved in entirely different types of airport usage and aviation activities. Petitioners' claim of unjust discrimination *vis-a-vis* general aviation thus is not supportable under the AHTA either as a matter of law or fact.

II. THE AIRPORT'S USER FEE METHODOLOGY PLACES NO UNDUE BURDEN ON INTERSTATE COMMERCE.

The Parties differ over whether the enactments by Congress of the AHTA and the Airport and Airway Improvement Act, 49 U.S.C. App. §§ 2201-2227 (1988 & Supp. III 1991), foreclose the courts from engaging in a Commerce Clause review of airport user fees. AOPA concurs with the Solicitor General that, under the comprehensive statutory scheme of federal aviation regulation, Petitioner airlines' claim of unjust discrimination in favor of general aviation with regard to airport user fees should have been presented in the first instance for resolution by the Secretary of Transportation. *See* Brief for the United States as *Amicus Curiae* in Opposition to Petition for Writ of Certiorari at 9-16. The courts should thus refrain from engaging independently in a dormant Commerce Clause review. Should Petitioners' claim of Commerce Clause applicability be granted, however, it is essential the Court appreciate that the different treatment of the airlines

and general aviation at Kent County Airport does not, in fact, disproportionately shift the costs of airport operations from local to out-of-state users.

Unsupported judicial conclusions equating general aviation with intrastate commerce, as in *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d at 1271, are based on erroneous assumptions. Even the *amicus* brief of American Trucking Associations, Inc., in the present case—the entire thrust of which is to preserve an Interstate Commerce Clause review—reflects substantial doubt as to whether general aviation may properly be categorized as intrastate commerce sufficiently even to give rise to a colorable Commerce Clause claim by Petitioners of disparate treatment by the airport. Brief for American Trucking Associations, Inc., as *Amicus Curiae* Supporting Petitioners at 22-23 & n.8.

The record in this case contains no evidence to support a conclusion that general aviation constitutes intrastate commerce or that the airlines and general aviation are similarly situated. To the contrary, in the little trial testimony addressing the nature and type of general aviation at Kent County Airport, Aeronautics Director Ross repeatedly stressed the existence of significant itinerant, *i.e.*, non-locally based, general aviation traffic. Ross Testimony at 697-702.

In point of fact, Federal Aviation Administration air traffic activity statistics disclose that of the 100,925 general aviation operations at Kent County Airport during fiscal year 1992, 57,705 of such operations, or roughly 57 percent, involved itinerant traffic. FAA Air Traffic Activity Report, Fiscal Year 1992, at 27. Earlier years show a similar pattern. The percentage of itinerant general aviation operations was even higher—approximately 63 percent—at the time this lawsuit was instituted. For fiscal year 1987, of the 97,329 general aviation operations, 61,824 were itinerant as compared with 35,505 local.

FAA Air Traffic Activity Report, Fiscal Year 1987, at 30. Since general aviation aircraft utilize the federal airways and thus operate in “air commerce” under the statutory definition, 49 U.S.C. App. § 1301(4) (1988), general aviation traffic at Kent County Airport should properly be classified predominantly as interstate commerce, albeit not as common carriers in competition with the airlines. Accordingly, the premise that general aviation amounts to purely local commerce in juxtaposition to the interstate airlines cannot be maintained.

Regardless of any classification of general aviation as either interstate or intrastate commerce, its competition with the airlines for passengers is *de minimus*. Evidence presented at trial established that general aviation aircraft based at Kent County are not used for commercial passenger transport. 738 F. Supp. at 1114. More likely, general aviation *brings* passengers to the airlines from outlying areas. The activities of local general aviation users, moreover, are markedly different from those of the airlines. Local general aviation operations primarily involve use of the airport as a base for corporate and business aviation, personal transportation, recreational flying, flight training, and emergency and public services—not as a terminal for the embarkation and debarkation of air passengers. *See* Ross Testimony at 697-98. Furthermore, the Circuit Court below concluded that the airlines bear no additional financial burden for air operations costs that otherwise would not exist were general aviation and the airlines both charged 100 percent of their properly allocated operational costs. 955 F.2d at 1064-65. The airport’s treatment of general aviation differently from the airlines with regard to collection of user fees thus has an inconsequential impact on the airlines’ business of interstate carriage of air passengers.

In *Evansville-Vanderburgh Airport*, this Court held that distinctions typically made with regard to airport charges based on commercial versus private use do not

amount to actionable discrimination in violation of the Constitution. Under *Evansville*, an airport user charge meets constitutional muster so long as it: (1) does not discriminate unjustly against interstate commerce or travel; (2) reflects a fair approximation of use or privilege of use; and (3) is not excessive in comparison with benefit conferred. 405 U.S. at 716-17. Under the third prong of the *Evansville* standard, Petitioners would not object to the Kent County Airport's allocation of air operation costs between general and commercial aviation. They maintain with regard to their discrimination claim under the AHTA only that non-aeronautical airport concession fees are not credited toward the airlines' allocation. As to the other two prongs, under which the disparate treatment of general aviation might be contested, the *Evansville* Court specifically found that different treatment of the airlines and general aviation is reasonable.

The *Evansville* analysis reflects an implicit recognition by the Court that the issue is whether airport fee schedules discriminate between similarly situated commercial air carriers flying interstate and intrastate routes, not between commercial and general aviation. *Id.* at 717. The Court did acknowledge that the general aviation fee schedule might be a relevant consideration in conjunction with the second prong of the test, *i.e.*, whether the charges reflect a fair approximation of the use of the facilities for which they are imposed. The Court concluded, however, that rational distinctions between general and commercial aviation could properly be drawn, especially in view of the substantial expenses associated with installing, maintaining, and operating the lengthy runways and taxiways, extensive airport and approach lighting systems, and sophisticated navigational equipment required to accommodate the commercial carriers. *Id.* at 718-19. *See also* note 3 *supra*. "In short, distinctions based on aircraft weight or commercial versus private use do not render . . . [the different charges wholly irrational as a measure of the relative use of the facilities for whose benefit they are levied]." 405 U.S. at 719.

Accordingly, even if the Court were to rule favorably on Petitioner airlines' request for review under the Interstate Commerce Clause, differentiations made by Kent County Airport in assessing airside operations fees for the airlines and general aviation could not be viewed as placing an unconstitutional burden on interstate commerce.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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QUESTIONS PRESENTED

1. It is undisputed that airports are authorized to charge a fee to aeronautical users of airport facilities to compensate the airport for the costs attributable to such users. The principal issue presented by this case and the primary focus of this brief is whether airport landing fees and terminal rents charged to airline tenants are unreasonable, when the methodology on which those fees are based does not take into account revenues generated by non-airline tenants, even though such charges to the airlines are no greater than the break-even costs to the airport for the facilities and space utilized.

2. Additionally, this case presents the issue of whether the Anti-Head Tax Act was intended by Congress to regulate the reasonableness of airport landing fees and terminal rents, and if it was, whether the Secretary of Transportation or the courts should, in the first instance, review the reasonableness of such charges.

3. Finally, the case presents the issue of whether, in light of Congress' regulation of the reasonableness of airport landing fees and terminal rents either under the Anti-Head Tax Act or the Airport and Airway Improvement Act, the courts should review the reasonableness of such fees under the dormant Commerce Clause.

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1993

No. 92-97

NORTHWEST AIRLINES, INC., *et al.*,
Petitioners,

v.

COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

**On Writ of Certiorari to the
 United States Court of Appeals
 for the Sixth Circuit**

**BRIEF OF AIRPORTS COUNCIL INTERNATIONAL-
 NORTH AMERICA AS AMICUS CURIAE
 IN SUPPORT OF RESPONDENTS**

STATEMENT OF INTEREST

The Airports Council International-North America (ACI-NA) represents the state, regional and local governing bodies that own and operate the principal airports served by scheduled air carriers in the United States, Canada and Bermuda. ACI-NA member airports handle approximately ninety percent of the domestic and international air passenger traffic in the United States.

ACI-NA submits this *amicus* brief in support of respondents, the County of Kent, Michigan, the Kent County Board of Aeronautics and the Kent County Department of Aeronautics (collectively, KCAB), because a correct resolution of this case is of vital importance to the national airport system and the local public entities charged with the responsibility of operating airports in the United States. At its heart, this case represents a challenge to the reasonableness of the methodology used in whole or in part by numerous airports, including 60 of the 100 largest U.S. airports, to determine the charges they levy on airlines for the use of airport facilities—the compensatory method.¹ Under that methodology, charges to airlines are based on the costs to the airport for the facilities and space the airlines use and airport operators assume the financial obligation and risk of building and operating the entire airport, including the obligation to fund major capital improvements. Funding for such improvements is partially based on retained revenues generated by the airport from non-airline concessions, such as parking lots, car rental companies, gift shops, advertising and food services.

A decision by this Court which accepts petitioner airlines' contention that the compensatory method of charging airlines is unreasonable, because it does not give the airlines the benefit of non-aeronautical concession revenues, would greatly impair the ability of the numerous airports which use the compensatory method to raise the revenues required for prudent airport management and development. This result would, therefore, adversely affect the financial struc-

¹ Airports Council International-North America, Survey of Ratemaking Utilized by 100 Largest U.S. Airports (1993).

ture presently used by many major airports and the ability of these airports to fund capital improvements and expansion projects desperately needed to properly serve the public.

Contrary to the airlines' contention, a methodology that takes concession revenues into account when establishing fees charged to the airlines for their use of airport facilities is not mandated by the Constitution, the Anti-Head Tax Act or this Court's decisions, and ACI-NA offers this brief in support of that position.²

STATEMENT OF THE CASE

As detailed in the opinions of the Courts below, airports generally use one of two methods in formulating the rates and fees they charge airline tenants for use of the airport—the compensatory method or the residual method (Pet. App. at 27a). Under the compensatory method, “the Airlines are only charged for the land costs, physical facilities and other expenses which can be directly allocated to them,” (Pet. App. at 3a) and it is the airport that assumes the financial risk of assuring that the airport meets its financial obligations, including the responsibility for meeting operating costs and debt service obligations on debt issued to fund major capital projects. By contrast, “residual cost methods base the rates and fees on the total cost of operation of the airport” (Pet. App. at 27a) and the airlines agree to make up any revenue shortfalls not met by other airport revenue sources such as non-airline concessions.

² The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

Similarly, a 1984 Congressional Budget Office (CBO) study on airport financing points out that:

"... the airport/airline relationship at the nation's major commercial airports typically is based on one of two very different approaches with important implications for airport pricing and investment practices:

The residual cost approach, under which the airlines collectively assume significant financial risk by agreeing to pay any costs of running the airport that are not allocated to other users or covered by non-airline sources of revenue; and

The compensatory approach, under which the airport operator assumes the major financial risk of running the airport and charges the airlines fees and rental rates set so as to recover the actual costs of the facilities and services that they use." "Financing U.S. Airports in the 1980's", a Study prepared by the Congressional Budget Office 18-19. (April 1984) (emphasis in original).

In practice, the choice of approach used to establish airport fees and rates determines the amount of control the local airport operator, as opposed to the airline tenants, exercises over airport capital programs. Thus, under residual ratemaking, as noted in the CBO study, in exchange for the guarantee of successful airport financial performance, the airline tenants are often given a significant amount of control over air-

port capital investment decisions by the insertion of so-called "majority-in-interest" clauses in their leases.³

"Majority-in-interest clauses give the airlines accounting for the majority of an airport's traffic the opportunity to review and approve or veto capital projects that would entail significant increases in the rates and fees airlines pay for the use of airport facilities." *Id.* at 25.

In contrast, under compensatory ratemaking:

"... because total revenues are not constrained to the amount needed to break even, and because surplus revenues are not used to reduce airline rates and charges, compensatory airports may earn and retain a substantial surplus, which can later be used for capital development." *Id.* at 23.

The choice by an airport operator as to whether to use a compensatory or residual method is based on a carefully balanced weighing of the benefits and burdens of each in the context of local conditions, including the proprietary objectives of the airport operator. Additionally, although the compensatory method can be implemented unilaterally by the airport, the residual method requires airline agreement to guarantee the successful financial performance of the airport. At airports where there is a revenue shortfall being paid by the local community, the Airlines will not agree to a residual approach, since to

³ See Note, *The Anti-Trust Implications of Airport Lease Restrictions*, 104 Harv. L. Rev. 548 (1990), discussing the anti-competitive and restrictive nature of "majority-in-interest clauses."

do so would mean incurring obligations to pay fees and charges in excess of the airport costs incurred in connection with the facilities used by the Airlines.

As found in this case, KCAB utilizes the compensatory method under which "the Airlines are only charged for the land costs, physical facilities and other expenses which can be directly allocated to them," (Pet. App. at 3a) and it is the airport that assumes the financial risk of assuring that the airport meets its financial obligations including the responsibility for meeting operating costs and debt service obligations on bonds issued to fund major capital projects. The trial record also reveals that the charges to the airlines equaled 43.3% in 1987 and 40.6% in 1988 of the total airport expenses. (*Id.* at 37a). Additionally, it is undisputed that the agreed to "rates and fees charged plaintiffs represented only 1.2% of the airlines' revenues generated at the Airport in 1988" and if the challenged rates had been applied by KCAB, "the airlines' payments would have equalled 1.5% of the revenues generated." (*Id.*)

After a bench trial, the district court issued a decision upholding the reasonableness of the fees charged to the airlines in all critical respects. The district court found, with regard to the landing fees and terminal rental charges which are at issue here, that the airline "plaintiffs were charged the break-even costs for the areas they use" and that the Airport "is not generating any of its surplus revenues from rates and fees charged plaintiffs." (Pet. App. at 37a). Accordingly, the district court held that "the Airport's charges to plaintiffs are reasonable in light of the benefits conferred on plaintiffs in exchange for the landing fees and terminal rental rates." (*Id.*) The

Court of Appeals did not disturb this determination. (Pet. App. at 9a). In fact, that court explicitly rejected the airlines' argument that the overall rates and fees were unreasonable because they generated a substantial profit for the airport. In so holding, the court rejected the reasoning of *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (1984), in which the Seventh Circuit determined that a methodology which disregards airport concession revenues when assessing fees charged to the airlines is unreasonable under the Anti-Head Tax Act, 49 U.S.C. App. 1513 ("AHTA"). Rather, the Court of Appeals found persuasive the reasoning of the district court in *City and County of Denver v. Continental Airlines, Inc.* 712 F. Supp. 834 (D. Col. 1989), which held that the AHTA does not apply to airport fees charged to concessions and that the airlines have no right to have their fees and charges reduced to reflect concession revenues received by the Airport.⁴

⁴ The district court concluded that the fees charged to the petitioners were reasonable with the exception of the overnight parking fee. Unlike the remainder of charges to the airlines which cover only costs, the court found that the airport overnight parking fee exceeded costs. (Pet. App. at 38a). The airport did not appeal the overnight parking fee portion of the district court's decision and the correctness of such decision is not before this Court.

The court of appeals affirmed the district court's judgment that the fees charged to the airlines were reasonable with the sole exception of the airport's allocation of 100% of the costs of crash, fire and rescue (CFR) expenses to the commercial airlines. The Court of Appeals found that such facilities serve general aviation and concession users as well (Pet. App. at 14a) and, therefore, it was unreasonable not to allocate some of the CFR costs to those users. The airport has not sought to have this Court review the CFR issue.

SUMMARY OF ARGUMENT

Since 1946, Congress, in exchange for federal funding, has required commercial airports to give written assurances "satisfactory to the Secretary" of Transportation (or predecessor) that they would make "the airport available for public use on fair and reasonable terms and without unjust discrimination", 49 U.S.C. 1110 (1946), now 49 U.S.C. App. 2210(a)(1). Consequently, the Secretary, not the courts, is charged with the responsibility of overseeing the reasonableness of airport charges. In 1973, in enacting the AHTA, Congress merely sought to prohibit "head taxes" and the reference in the statute to "reasonable" airport fees simply was intended to restate current law and clarify what is not prohibited. In short, the AHTA was not intended to create a new and different judicially enforceable requirement with regard to airport aeronautical user fees.

Furthermore, there is no need for Commerce Clause review of airport aeronautical user fees since Congress has delegated to the Secretary of Transportation responsibility for ensuring that such fees are reasonable and nondiscriminatory.

If, however, this Court determines that it is proper for the federal courts to review the reasonableness of airport aeronautical fees under the AHTA and/or the Commerce Clause, it is evident that the landing fees and terminal rental charges being challenged here are in all respects valid. It is undisputed that in formulating rates and fees for its airport tenants, KCAB, since 1968, has used the compensatory method (Pet. App. at 27a). The airline petitioners argued below that in order for their landing fees and terminal rental

charges to be "reasonable" in compliance with federal law, "KCAB must cross credit the concession revenues when establishing [their] rates and fees." (Pet. App. at 31a). As the district court noted "[t]his contention by [the airlines] would essentially require the Airport to share the surplus revenues from non-airline users with [them]." (*Id.*) The airlines make an identical argument before this Court. (Br. at 27). Additionally, the airlines argue that the airport unfairly allocates to the airlines a disproportionate share of the airside costs and overcharges the concessions and ultimately airline passengers for the cost of providing concessions. (Br. at 23-26).

Stripped to its bare essentials, the airlines' argument is based on the faulty premise that they are entitled to share in the benefits provided to the airport operator by surplus concession revenue without sharing in any of the burdens, such as the assumption of the risk that the airport will remain financially successful. The Airlines' argument finds no support in either the AHTA or in the Commerce Clause. In fact, it is undisputed that Congress has not preempted the authority of airport operators to assess airport fees and that neither the AHTA nor the Commerce Clause requires that any particular type of ratemaking be used when computing airport user fees. Therefore, if the federal courts have the authority, in the first instance, to review the validity of such charges, such review, under either the AHTA or the Commerce Clause, would be based on essentially one identical and exceedingly narrow standard—the standard of "reasonableness."

It is ACI-NA's position that the fee structure used by KCAB, which is similar to the structure used by

numerous other airports, including 60 of the 100 largest U.S. airports, is patently reasonable. A contrary conclusion would require a drastic restructuring of the financial relationships between airports and airlines at numerous airports throughout the country and would result in a decision which, contrary to Congressional intent embodied in the airport development legislation, would cripple the ability of airports to finance needed capital development.

ARGUMENT

I. REVIEW OF THE REASONABLENESS OF AIRLINE CHARGES IS VESTED, IN THE FIRST INSTANCE, IN THE SECRETARY OF TRANSPORTATION, AND NOT THE COURTS.

This brief is primarily devoted to demonstrating that the compensatory method is a reasonable way to compute the fees and charges to airlines for use of an airport. However, ACI-NA also asserts that neither the AHTA nor the Commerce Clause vest the courts with jurisdiction to review, in the first instance, the reasonableness of airport charges.

Since 1946, Congress has required that airports, as a condition for the receipt of federal funds, give written assurances "satisfactory to the Secretary" of Transportation (or predecessor), that they would make "the airport . . . available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. 1110(1) (1946), now, 49 U.S.C. App. 2210(a)(1). Moreover, in 1970, Congress added the requirement that the airport operator will maintain a fee and rental structure "...which will make the airport as self-sustaining as possible" 49 U.S.C.

1718(8)(1970), now 49 U.S.C. App. 2210(a)(9). These assurances are enforced by the Secretary of Transportation through a comprehensive administrative scheme which insures that complaints of violations are adjudicated in a uniform manner consistent with Congressional policy favoring a uniform regulatory system for the national aviation system. See *New England Legal Foundation v. Massachusetts Port Authority*, 833 F.2d 157, 172 (1st Cir. 1989); 49 U.S.C. App. 2210(b), 2218(a); 14 C.F.R. Part 13 (1993). Thus, initial review of the validity under federal law of airport fees has been delegated by Congress to the Department of Transportation as part of its administration of all federal aviation statutes, including those statutes which govern national planning and federal funding of airports. "[V]irtually all the Nation's airports serving commercial airlines have development projects that implicate the[se] requirements." (Brief of the United States as *Amicus Curiae* In Opposition to Petition for Writ of Certiorari (U.S. Br. in Op.) at 15, n.11).

In 1973, as part of the Airport Development Acceleration Act, Congress passed the AHTA. 49 U.S.C. App. 1513. The plain language of the AHTA prohibits only certain types of fees and charges, namely a "tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce" Other charges, including those levied by states or political subdivisions as compensation for use of airport facilities (such as the ones involved here) were carefully carved out of the prohibition. See, *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 12, n.6 (1983). In fact, the aims of the AHTA were clearly set forth by Congress in the statutory lan-

guage and defined in the legislative history, which demonstrates that Congress intended to prohibit states and their political subdivisions from imposing "head taxes" and in no manner modified the authority previously delegated to the Secretary of Transportation to regulate the reasonableness of airport user fees through its enforcement of the grant assurances in the aviation statutes. See S. Rep. 93-12, *reprinted* in 1973 U.S. Code Cong. & Admin. News at 1446 (Congress viewed head taxes as a "new, inequitable, and potentially chaotic burden of taxation of the nearly 200 million persons who use air transportation each year.") While subsection (b) of the AHTA refers to "reasonable" user fees, such reference simply clarifies what is not a "head tax" by restating the standard for such fees previously set forth in the aviation statutes and by this Court in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). In, *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 170 (1st Cir. 1989), the First Circuit sustained a determination by the Secretary of Transportation that challenged landing fees were not a "head tax" in form or substance and, therefore, the AHTA had no applicability to such charges. In short, there is absolutely no reason to believe that Congress intended the AHTA to create an additional substantive limitation on aeronautical user fees to be enforced by the courts.

Consequently, the AHTA does not provide any basis for the federal courts to review, in the first instance, the reasonableness of airport fees because Congress has expressed its intent to place that function in the hands of the Secretary of Transportation. Therefore, this Court should find that either the AHTA does not

regulate the reasonableness of airport user fees or that the Airlines have no private right of action under the AHTA to make such a challenge. (U.S. Br. in Op. at p. 8, arguing that there is no implied private right of action under the AHTA).

Similarly, there is no reason to trigger review by the courts of airport aeronautical user fees under the dormant Commerce Clause. When, as is the case here, Congress has stated that airport aeronautical user fees are permissible, as long as they are reasonable and non-discriminatory, and has provided an administrative mechanism for review of such fees, "Congress has struck the balance it deems appropriate [and] the courts are no longer needed to prevent States from burdening commerce" in this area. *Merriam v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) ("Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause.")

II. THE AIRPORT FEES AT ISSUE HERE ARE REASONABLE.

A. *Evansville Provides The Standard For Review In This Case.*

Turning to the issue of whether the KCAB fees under review here are "reasonable", ACI-NA and the airline petitioners start on common ground. The airline petitioners assert that "the *Evansville* standard should serve as the baseline against which to measure the reasonableness of fees under §1513(b) [of the AHTA]." (Br. at 22). ACI-NA agrees. As set forth above, it is ACI-NA's position that it is the Secretary of Transportation, not the courts, who has initial jurisdiction to review these fees. However, if this Court should determine that such jurisdiction is vested in

the courts under the AHTA or the Commerce Clause, ACI-NA submits that such review is circumscribed by the highly deferential standard of review set forth in *Evansville*.

Congress enacted the AHTA in direct response to *Evansville*. In that case, this Court determined that a local "head tax" imposed directly on airline passengers to help support airport facilities "impose[d] valid charges on the use of airport facilities constructed and maintained with public funds" and, therefore, did not violate the Constitution, including the Commerce Clause. 405 U.S. at 720. In so holding this Court applied the familiar and well-established standard used to judge the reasonableness of user fees on publicly owned facilities in interstate commerce which recognizes that the "States are empowered to develop 'uniform, fair and practical' standards for this type of fee." (*Id.* at 715.)

After *Evansville*, Congress "...concluded that the proliferation of local [head] taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers." (*Aloha*, 464 U.S. at 9) (footnote omitted). Congress' answer to these problems was the AHTA. However, while "Congress passed §1513(a) [of the AHTA] to deal primarily with local head taxes on airline passengers ..." (*Id.* at 13), it plainly did not include in its preemptive sweep every charge imposed by airports for use of airport facilities. In fact, Section 1513(b), "clarifie[d] congress' view that the States are still free to impose on the airlines and air carriers 'taxes [or charges] other than those enumerated in subsection (a).'" (*Aloha*, 464 U.S. at 12 n.6). For aeronautical user charges, it simply restated the then

existing requirement in the Airport and Airway Development Act of 1970 (49 U.S.C. §1718(1)), that they should be "reasonable". There is no reason, therefore, to conclude that by passage of the AHTA, Congress intended that airport user fees would be reviewed under any different standard from that applied to such fees in *Evansville*. As stated in *Evansville*:

"[W]here a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself. . . ." 405 U.S. at 712-713.

Evansville goes on to provide that so long as the charge

"is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users." (*Id.* at 716-717).

In dealing with assertions that the fee is excessive in relation to the cost, states are not held to "a punctilio of proof" and are "not required to compute with mathematical precision the cost to it of the services necessitated by the . . . [airport] traffic." *American Airlines, Inc. v. Massachusetts Port Authority*, 560 F.2d 1036, 1039 (1st Cir. 1977), quoting, *Clark*

v. *Paul Gray Inc.*, 306 U.S. 583, 599 (1939). Similarly, the policy of the Secretary of Transportation is that "airports are given wide latitude in selecting a particular rate methodology and fee structure." (U.S. Br. in Op. at 8). Measured against the applicable deferential standard set forth above, it is evident that the fees involved here clearly pass muster.

B. The Evansville Reasonableness Standard Is Plainly Satisfied Here.

Here, there can be no doubt that the fees charged the airlines by KCAB are "based on some fair approximation of use or privilege for use" (*Id.* at 716-717) and are not excessive since, as found by the district court, the airlines are charged only for "the break-even costs for the areas they use" (Pet. App. at 37a)—the runways they utilize and the terminal facilities they occupy. As at most airports around the country, landing fees are based on aircraft weight and terminal rents are based on square footage of actual use and a proportionate share of public space. (Pet. App. at 28a). Airport space which the airlines do not use results in no charge to them. In fact, KCAB does not charge them for some areas of the airport the airlines do use, such as parking areas used by airline employees, and roped off space in front of airline ticket counters. (*Id.*) As the district court found "[i]t is clear . . . that the Airport is charging plaintiffs only for their share of the operating expenses and is not generating any of its surplus revenues from rates and fees charged plaintiffs." (Pet. App. at 37a) (emphasis supplied). Based on this finding, the airlines can only prevail if federal law mandates that airlines be given access to airports at a charge less than the cost of the facilities and space they utilize. Plainly

this is not the law and the standard of reasonableness is satisfied where, as here, the airlines are charged "only for their share of the operating expenses." (*Id.*)

In fact, the airlines challenge to these fees is no more than a direct attack on the compensatory method, utilized by numerous publicly operated airports throughout the country, including 60 of the 100 largest U.S. airports. What the airlines overlook, however, is that the *Evansville* standard does not require that a state adopt any particular formula when computing user fees. The airlines attempt to support their argument by focusing on the surplus revenues which KCAB has been able to retain.⁵ This surplus, however, is derived not from the Airlines but rather from non-aeronautical users, principally fees generated by concessions and the parking lot. (Pet. App. at 28a). Therefore, the airlines' argument amounts to no more than an erroneous assertion that the compensatory method is flawed because it does not give the airlines a credit for surplus concession revenues.

The airlines further argue that the fees they pay should reflect non-airline revenues because airline pas-

⁵ The district court found that at the end of 1989, KCAB had reserves of over nine million dollars. (Pet. App. at 30a). The airlines attempt to attach some improper purpose to KCAB's retention of the surplus, characterizing it as a financial windfall. (Br. at 33). The airlines' argument totally ignores the fact that Congress is aware of the profitability of some airports and has provided, with certain very limited exceptions, that such funds will be used only to defray the costs of airport operations and development. In the grant assurance provisions added by the Airport and Airway Improvement Act of 1932, P.L. No. 97-248, 96 Stat. 671, codified at 49 U.S.C. App. 2210(a)(12), Congress generally restricted the use of such revenues to "the capital and operating costs of the airport . . ."

sengers are paying those fees in addition to absorbing the fees charged to the concessions. (Br. at 32). This "total cost of travel", they reason, will "lead to a decline in air travel and a corresponding decline in Airline revenues." (*Id.*) (emphasis in original). Assuming, contrary to the holding by the Sixth Circuit, that the airlines have standing to assert the claims of non-airline as well as of airline customers, (Pet. App. at 8a) ACI-NA submits that this contention finds no support in the AHTA or in the facts of this case. The airlines would essentially turn the courts into public utility commissions sitting in judgment over the impact on airline revenues and air travel of an entire airport fee structure.⁶

⁶ The airlines erroneously attempt to blame the charges imposed upon them by airports generally, and in particular at KCAB, for all of their well-publicized fiscal problems. This, perhaps, is the most ludicrous of all of the airlines contentions. Whatever may be the cause of the fiscal condition of airlines, it is certainly not airport charges. The District Court found that here the rates under the challenged ordinance would amount to 1.5% of the revenues generated by the airlines at the Airport, and the previously agreed-to rates would amount to 1.2% of those revenues. (Pet. App. at 37a) Thus, the new fees will result in an increase of only three-tenths of one percent of the airlines' airport-related revenues. Moreover, Airport charges have consistently remained a small percentage of the overall operating costs of airlines. A study undertaken by ACI-NA concluded that "on average for the U.S. Airline Industry, approximately 4% of total airline costs are paid for airport rents, fees and charges." Other costs, such as travel agent commissions and labor related costs, account for a far greater percentage of airline operating expenses. "Airport Costs and the U.S. Airline Industry", prepared by ACI-NA at 14. (1993).

Due to the problems in the airline industry, the President proposed, and Congress approved, creation of "The National

Under the compensatory method, it is the local airport operator as landlord that has undertaken the risks and made the capital investments necessary to build the airport, and which is responsible for continuing to collect airport revenue sufficient to operate and make the capital improvements required to maintain and improve the airport for the benefit of the public. While airlines that lease space in airports using the residual method receive a credit for non-aeronautical revenues, these airlines also share in the financial burdens of airport operation and development by guaranteeing the successful financial performance of those airports. Here, the airlines would force KCAB, and airports in general, to give the airlines the benefit of concession revenues without forcing them to also assume the burdens—the financial risks inherent in the operation and capital development of the airport.

Finally, the airline petitioners would have this court believe that unless they prevail in this litigation air-

Commission to Ensure a Strong Competitive Airline Industry" which was given the mandate "to investigate, study and make policy recommendations . . . concerning the financial health and future competitiveness of the U.S. airline and aerospace industries." National Commission to Ensure a Strong Competitive Airline Industry, *Change, Challenge and Competition: A Report to the President and Congress* (August, 1993). Despite the Commission's detailed report, delving into the numerous causes of the financial problems of the airline industry, there is absolutely no suggestion that airport charges have in any way caused or contributed to the airlines' financial problems. Consequently, it is evident that the airlines' claims that airport charges in general, and the charges at KCAB in particular, are a cause of their financial difficulties are patently erroneous.

port operators will "create enormous Airport surpluses" having no legitimate purpose. (Br. at 4). This completely overlooks the fact that almost all major airports, such as Kent County International Airport, are managed by a board of directors or commissioners, such as the KCAB, the members of which are public officials statutorily charged with the responsibility of providing and operating airport facilities for the benefit of the public. The restraints on the expenditure of airport funds for an airport board are the same as for any other public body which operates for the benefit of the public. Their decisions are reviewable both politically and in the State Courts.

C. The AHTA Does Not Apply to Concession Revenues.

The courts below were also clearly correct when they held that the AHTA does not regulate fees charged to concessions and, therefore, airports are simply not required to take those revenues into account or give the airlines a credit for those revenues when establishing airline fees. The airlines' argument to the contrary finds no support in the language of the AHTA or its legislative history.

The only mention of airport user charges in the AHTA is in Section 1513(b), which explicitly *permits* airports to collect "reasonable rental charges, landing fees, and other services from *aircraft operators* for the use of airport facilities." (emphasis supplied.) Therefore, the plain wording of the AHTA does not purport to apply to concession revenues. In point of fact, a difference in the treatment of concession fees and airline charges in the AHTA reflects the difference in the very nature of the respective uses. "Per-

sons affected by the rates, rental and charges for the restaurants, gift shops, parking lots and rental cars, include persons who are not air passengers." Furthermore, passengers *must* make "use of the airport's runways, taxiways and airline portions of the terminal area", but a passenger is *not* required to make use of concessions. (*Denver*, 712 F. Supp. at 838-839). In other words, unlike the use of aeronautical services where "the air passenger is captive and her purse is necessarily and directly affected by . . . [airport] charges to the airlines," the use of concessions is determined "by individual decisions driven by individual perceptions of need and economic values." (*Id.* at 839).

Indeed, the issues the airlines would have the federal courts resolve in this case—choices between different theories of ratemaking relating to concession revenues and cost allocations—are complicated, fact-bound issues. It is inconceivable that Congress, which prescribed *absolutely no guidelines* in the AHTA for such inquiries, other than one of "reasonableness", intended the courts to use that statute as a springboard to place themselves in the role of a regulatory agency responsible for developing regulatory standards with regard to ratemaking.⁷

⁷ In *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d at 1268, the Seventh Circuit, reviewing the airport fee structure at Indianapolis International Airport, held that when concession fees, which are ultimately paid by the passengers, are added to airline user fees, "the result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers and is therefore unreasonable under the state and federal statutes." As noted above, this approach finds absolutely no support in the AHTA which the Court

There is nothing in the legislative history of the AHTA which indicates that Congress intended that airport operators take concession revenues into account when establishing airline fees. In fact, quite to the contrary, there is evidence that Congress took into account the importance of concession revenues to airports when it considered the AHTA's impact on airport financing. "Congress recognized concession revenues as an important source of airport capital funding since federal government grant money does not finance 100% of any 'airport development project.'" (*Denver*, 712 F.Supp. at 837). In a Senate Report, it was noted that:

"Local governments are increasingly unable to finance airport improvements. . . The airport operators testified that charges on concessionaires have been increased to about their maximum limits.

purportedly applied. Moreover, the Seventh Circuit, erroneously assuming that "[n]o agency has regulatory authority over the rate practices" of that airport, explicitly placed itself in the role of a regulatory agency and relied on its interpretation of relevant "public utility regulation." (*Id.*) We submit that in adopting this approach, the Court assumed the role of a legislator rather than interpreter of the law as written by Congress. As Judge Nelson of the Sixth Circuit stated in his opinion affirming the judgment of the district court in this case, "[r]ate-making, including the cost-allocation component of rate making, 'is essentially a legislative function.'" (Pet. App. at 22a, *quoting*, *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589 (1945)). In the absence of any statutory standards other than the standard of reasonableness, it is simply inappropriate for a court, as the Seventh Circuit did in *Indianapolis*, to "imagine [itself] in the role of a regulatory agency" (*Id.*) and pick and choose the regulatory standards it deems appropriate for airport rate-making.

The remainder must be obtained from airline and other users of airport facilities, including concessionaires, or be absorbed by the parent local government through subsidy." S. Rep. No. 12, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Admin. News 1434, 1439.

Moreover, when Congress apportioned additional federal funds to smaller airports in the same legislative package that enacted the AHTA, Congress, in reliance on large airports' ability to raise capital by the accumulation of concession revenues, decided not to increase funds for such airports.

"... we have heard no evidence indicating that the nation's 22 largest airports, the so-called large hubs, have experienced financial difficulty resulting in failure to participate in the [Airport Development Aid Program]. On the contrary, the large hubs appear for the most part to be self-sustaining. *In many cases these airports are actually profitable. Fees paid by the airlines for landing and for space rental and fees obtained from concessionaires for parking, restaurants, shops, etc., are adequate to cover both the operational expenses of the airports and to underwrite the capital investment borrowing required.*" S. Rep. No. 12, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Admin. News 1434, 1440. (emphasis supplied).

Additionally, federal policy in effect since 1970 has explicitly required that airports receiving federal funds agree to "make the airport as self-sustaining as pos-

sible under the circumstances existing at that particular airport" 49 U.S.C. App. 2210(a)(9). It is through retained earnings from concessions that compensatory airports are able to remain self-sustaining and fund projects for airport development without subsidies from local taxpayers.

The airlines' unsubstantiated claim that airports generate enormous financial profits is simply untrue. In reality, airport surpluses are modest when compared to future capital needs. Moreover, surpluses, or more properly retained earnings, are necessary to an airport's credit standing since they are one of the factors assessed by bond rating agencies and investors in evaluating the security and, therefore, marketability of an airport's bonds. In the financing of airport capital improvements by the issuance of revenue bonds, it is not only customary, but mandatory that a "coverage" in excess of operating and debt service cost be generated each year, both as a test of compliance with bond covenants and as a necessity for the issuance of additional parity debt. Furthermore, any retained earnings that an airport may generate from its non-aeronautical operations are, in accordance with federal grant assurances, retained by the public airport operator and used for capital development that will benefit all airport users, not just the airlines.⁸

⁸ The Air Transport Association, based on a misreading of an American Association of Airport Executives Survey of Airport Rates and Charges 1991-92, alleges that airports have substantial "surplus revenues in excess of [their] operating costs". (Brief of Air Transport Association of America as *Amicus Curiae* in Support of Petitioners at 8). The figures cited by the ATA, in point of fact, do not represent airport surpluses in that they

The public bodies charged with the responsibility of providing airport facilities and operating an airport for the general public must, as with any enterprise, be permitted to invest for future expansions and improvements. To successfully operate and develop an airport one must constantly plan for the future. In addition, it is essential that airports be permitted to accumulate reserves for such things as the provision of matching funds for federal grants and unforeseen contingencies. It clearly is not prudent management for an airport, which bears the financial risk of the success of the airport, to currently spend every dollar it receives. *Evansville* acknowledges this, stating that charges must reflect a "fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed."⁹ 405 U.S. at 717 (emphasis supplied).

exclude other costs appropriately incurred by airport operators, such as general administration and, more significantly, depreciation and interest costs incurred to support the huge infrastructure investments in airside, landside and terminal facilities. Ironically, one of the airports cited as having an excessive surplus, Seattle Tacoma International Airport (*Id.* at 9) is a residual airport where the airlines have by agreement consented to any revenue retention by the Airport.

⁹ Petitioners refer to *Evansville* for the misleading proposition that an airport may only impose rates to generate sufficient funds to cover current and past deficits. (Br. at 12). The reference properly reads, "The respondents in No. 70-99 have advanced no evidence that a \$1 boarding fee, if permitted to go into effect, would do more than meet these past, as well as current, deficits." 405 U.S. at 720. In fact, the fees which the Court upheld as "reasonable" in *Evansville* were moneys held by the Authority "in a separate fund for the purpose of defraying the *present and future costs* incurred by the Airport Authority in the construction, improvement, equipment, and maintenance of the Airport and its facilities for the continued

D. Congress Recognizes The Tremendous Capital Needs Of Airports.

Rather than restricting the revenues which airports can receive, as the airlines would have this Court do, Congress recently determined that airport revenues must be expanded. The enormous growth in the number of air travelers following airline deregulation has led to greater congestion at airports, thus increasing the need for capital improvements to increase airport capacity. Responding to these needs, Congress enacted the Aviation Safety and Capacity Expansion Act of 1990, P.L. 101-508, which amended the AHTA to permit airport operators to impose passenger facility charges ("PFCs") to help defray the costs of airport development programs. The House Report proclaimed the urgency of the problem:

"The bill reported by the Committee, the Aviation Safety and Capacity Expansion Act of 1990, establishes a comprehensive program to develop our nation's aviation system to meet the needs of the 1990s.

There is an urgent need for this legislation. Our airport and airway systems are now inadequate to handle the demands they face. If we do not act promptly to expand the capacity of the system, congestion will get much worse.

* * *

Extensive capital development will be re-

use and future enjoyment by all users thereof." *Id.* at 709. (emphasis added). Such language expressly acknowledges that it is not unreasonable for an airport to generate revenues in excess of the current deficit.

quired to overcome these problems. A study by airport associations, which is generally accepted by the Department of Transportation, concludes that airport capital development needs will total \$10 billion a year during the next 5 years. In addition, modernization of the nation's air traffic control system is estimated to cost approximately \$13.5 billion through 1995. Meeting these needs will require massive combined effort on the federal and local levels. The Aviation Safety and Capacity Expansion Act creates the framework under which the necessary development can be accomplished."¹⁰ H. Rep. No. 581, 101st Cong., 2d Sess. (1990) at 11.

The House Report also noted:

¹⁰ In the same legislation, Congress authorized federal Airport Improvement Program grants of \$1.8 billion for fiscal year 1991 and \$1.9 billion for fiscal year 1992 (H. Rep. No. 581, 101st Cong., 2d Sess. (1990) at 16) recognizing that, with \$10 billion in annual capital development needs through non-federal sources.

The chairman of the House Public Works and Transportation Committee, the authorizing committee responsible for aviation legislation, summed up the point during the floor debate on the 1990 bill:

"We have reached a point in the development of our air transportation system where we need to enable all levels of government, Federal, State, and local, to do everything they can to finance infrastructure improvements at the Nation's airports.

Federal funding alone will not be sufficient to meet the needs for airport development."

136 Cong. Rec. H. 6293 (daily ed. Aug. 2, 1990) (remarks of Rep. Anderson).

"In view of the extensive capital development which airports must undertake, the Committee believes that it is appropriate to authorize a new local source of funding, a passenger facility charge. *A new source is needed because of the increased needs for airport development. A new source is also needed because at some airports the incumbent airlines have the power to stop or delay needed capital development, and may exercise these powers when they are having financial problems or when development of an airport would facilitate new airline competition. Id. at 14 (emphasis supplied).*

Consequently, a decision that airports using the compensatory method must use revenues generated by concessions to reduce the fees charged to airlines below the cost of providing the facilities and services they use would run counter to Congress' intent, evident in the AHTA as amended by the Aviation Safety and Capacity Act of 1990, that existing sources of airport capital funding, such as concession revenues and federal aid, must be expanded rather than restricted.

In short, the compensatory method, which results in the airlines being charged for the costs of the airport facilities and space they use, more than satisfies the standard of reasonableness established by this Court in *Evansville*.

CONCLUSION

For these reasons, the court should affirm the judgment of the court below dismissing the airlines' challenge to the reasonableness of the landing fees and

terminal rental charges levied by the KCAB on the airlines.

Respectfully submitted,

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ADDENDUM

CONSTITUTIONAL AND STATUTORY ADDENDUM

The Commerce Clause of the United States Constitution,
Art.1, §8, Cl. 3:

"The Congress shall have Power . . . to regulate
Commerce . . . among the several states . . ."

The Anti-Head Tax Act, 49 U.S.C. App. §1513:

"(a) Prohibition; exemption

No State or (political subdivision thereof . . .) shall
levy or collect a tax, fee, head charge, or other
charge, directly or indirectly, on persons trav-
eling in air commerce or on the carriage of per-
sons traveling in air commerce or on the sale of
air transportation or on the gross receipts de-
rived therefrom

(b) Permissible State taxes and fees

[N]othing in this section shall prohibit a State (or
political subdivision thereof . . .) from the levy or
collection of taxes other than those enumerated in
subsection (a) of this section . . . and nothing in
this section shall prohibit a State (or political sub-
division thereof . . .) owning or operating an air-
port from levying or collecting reasonable rental
charges, landing fees, and other service charges
from aircraft operators for the use of airport fa-
cilities."

49 U.S.C. §2210

"(a) Sponsorship. As a condition precedent to ap-
proval of an airport development project con-
tained in a project grant application submitted
under this title, the Secretary shall receive as-
surances, in writing, satisfactory to the Secre-
tary, that—

(1) the airport to which the project relates will

be available for public use on fair and reasonable terms and without unjust discrimination . . .;

(9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible . . .;

(12) all revenues generated by the airport, if it is a public airport . . . will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned and operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property . . .;

- (b) Compliance. To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this title, as the Secretary considers necessary. Among other steps to insure such compliance, the Secretary is authorized to enter into contracts with public agencies on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and constructs space or facilities thereon at Federal expense, the Secretary is authorized to relieve the sponsor from any contractual obligation entered into under this title, the Airport and Airway Development Act of 1970, or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent the Secretary finds that space no longer required. . . ."

"(a) General rule. The Secretary is empowered to perform such acts, to conduct such investigations and public hearings, to issue and amend such orders, and to make and amend such regulations and procedures, pursuant to and consistent with the provisions of this chapter, as the Secretary considers necessary to carry out the provisions of, and to exercise and perform the Secretary's powers and duties, under this chapter."

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-97

NORTHWEST AIRLINES, INC., *et al.*,
Petitioners,

v.

COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

**BRIEF FOR
CITY OF LOS ANGELES AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICUS CURIAE

Amicus curiae, the City of Los Angeles, owns and, through its Department of Airports, operates Los Angeles International Airport ("LAX") and three smaller airports in the Los Angeles area. LAX is one of the largest international airports in the United States. On an average day, 130,000 passengers and 3.8 million pounds of freight and mail pass through the airport on 1,700 flights. LAX serves the residents of the Los Angeles area and millions of visitors drawn to the region's business, commercial and

tourist enterprises and activities. Visitors arriving at LAX spend approximately \$17.7 million per day in the region. LAX also is a large hub airport, serving travelers *en route* to and from national and international destinations. It is a major gateway to the Pacific, Asia, and Australia, as well as to Europe, Canada, Mexico and Latin America.

LAX creates \$3.3 billion in aviation activity at or near the airport, and almost three times this sum in air freight and visitor expenditures in the region. Approximately 50,000 jobs are directly attributable to LAX.

LAX recently adopted a "compensatory" methodology to calculate airline landing fees. This methodology charges to airline tenants only those costs attributable to their use of airport services and facilities. It does not subsidize airline costs with revenues from concessionaires and other airport tenants, but it does allow an airport to use non-airline revenues to fund capital projects. In this and other cases, now including LAX, the airlines are challenging the right of an airport to use a compensatory methodology to determine landing fees charged to the airlines.¹

Revenues from concession and other non-airline tenants are critical to allow LAX to become self-sustaining, which, contrary to the airlines' assertion in this case, does not simply mean that an airport's current operating revenues must equal its current operating costs. Airports have massive capital needs, and if airports are unable to fund nec-

¹ In a lawsuit filed recently in the United States District Court for the Central District of California, airlines servicing LAX have sought to invalidate its landing fees, among other grounds, as unreasonable under the Anti-Head Tax Act, 49 U.S.C. app. 1513 ("AHTA"). *Air Transport Ass'n of America v. City of Los Angeles*, No. CV 93-4539-AWT (filed July 30, 1993). As in the case before the Court, the airline plaintiffs in the Los Angeles suit seek a judicial determination requiring that the airport cross-credit in favor of the airlines the concession and other revenues the airport earns from non-airline tenants. The City of Los Angeles has moved to dismiss the complaint on the ground that the AHTA does not create a private right of action.

essary expansion and improvement projects, they cannot be self-sustaining.

The City of Los Angeles wants to manage and develop its concessions and other sources of non-airline income efficiently in order to fund the capital projects necessary for LAX to maintain and improve its position as a world-class airport. The City believes that LAX, as a public enterprise, plays an important role in the economic well-being of Los Angeles and the region. Therefore, it is necessary that the City and its citizens have the financial capability to decide the priorities and direction of LAX. The City submits this brief to provide the Court the perspective and experience of one of the nation's largest airports on the issues of airport rate-setting and capital funding.² The Court's resolution of the issues in this case likely will have a significant effect on the financial condition of LAX and the nation's other large hub airports.

SUMMARY OF ARGUMENT

The City of Los Angeles urges this Court to affirm the judgment of the U.S. Court of Appeals for the Sixth Circuit, which properly upheld the right of an airport to choose a compensatory methodology for the calculation of rates and charges. As applied by the City of Los Angeles, the compensatory methodology is a reasonable method for calculating charges. The methodology attributes to airlines only the costs of those services the airport provides to the airlines, and results in fee amounts comparable to those assessed by airports across the country. The compensatory methodology also makes available a source of revenue critical to an airport's ability to be less dependent upon federal assistance and debt, and thus, more self-sustaining.

² The City of Los Angeles is a political subdivision of a State and is therefore permitted to file, through its authorized law officer, an *amicus curiae* brief without the consent of the parties. Sup.Ct.R. 37.5.

No federal statute, regulation or policy, and certainly nothing in the Anti-Head Tax Act, prohibits the use of a compensatory methodology by an airport proprietor. To the contrary, the courts and the Department of Transportation have given broad discretion to airport proprietors in their selection of a rate methodology and fee structure. In no sense can concession revenues be found to constitute a tax on air passengers since no airport user is required to use the concessions or services offered. Moreover, the airlines' contention that they are the true source of airport concession revenue is demonstrably false and, even if true, provides no legal basis for requiring that only a residual methodology be used in calculating airport fees and charges, or that concessionaires share in the costs of air-side operations under a compensatory methodology.

ARGUMENT

I. THE COMPENSATORY METHODOLOGY FOR DETERMINING LANDING FEES IS NOT ONLY REASONABLE BUT SERVES THE GOALS OF AIRPORT DEVELOPMENT.

A. The Compensatory Methodology Charges Airlines The Costs Of Services The Airport Provides To The Airlines.

Respondents and LAX use a "compensatory" or cost-of-services methodology to calculate landing fees charged to the airlines that use airport facilities and services. A compensatory methodology is similarly used to determine landing fees at many of the nation's other major airports, including those in Boston, Denver, St. Louis, Phoenix and New York.

The compensatory methodology is premised on a theory of cost recovery. It separately charges costs to, and accounts for revenues received from, the airport's various classes of tenants. Accordingly, the rates charged to airline tenants reflect all the costs associated with the airlines'

use of airport facilities and services, without crediting to those airlines revenues derived from other non-airline tenants, such as concessionaires. The airport proprietor is free to generate, retain, and use profits or surpluses from non-airline tenants to fund airport capital projects. As a result, the airport has an incentive to manage and develop its non-airline sources of revenue productively.

In contrast, a "residual" methodology provides for the calculation of airline charges by first determining total airport revenues (excluding landing fees from airlines), and then subtracting total airport expenses. Landing fees are then calculated to cover the amount by which total expenses exceed total revenues. In addition, airlines typically permit airports to apply an amount towards the airport's capital fund, regardless of whether these funds are earmarked for current or future capital projects. As a result, airlines exercise control over the amount of total revenues allocated to the airport's capital fund. Airlines generally prefer a residual methodology because it subsidizes airline costs with revenues received from non-airline tenants and gives airlines a degree of control over airport expenditures.

B. The Compensatory Methodology Is Inherently Reasonable.

The compensatory methodology is inherently reasonable because it charges airlines only those costs properly attributed to the airlines. Charges assessed to the airlines are not based on the airport's future capital needs, but on the current costs of only those facilities and services used by the airlines. For these reasons, virtually all courts that have considered the compensatory methodology as a basis for determining landing fees have concluded that the methodology is reasonable.³

³ See *Northwest Airlines, Inc., v. County of Kent, Michigan*, 955 F.2d 1054, 1061 (6th Cir. 1992) (fees are reasonable if based on a fair

This Court has also held that "it is the amount of the tax not its formula, that is of central concern." *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716 (1972) (emphasis added); see also *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("it is the result reached not the method employed which is controlling."). The application of the compensatory methodology by the City of Los Angeles at LAX has resulted in landing fees that, even after recent increases, are reasonable in amount, and are less than or comparable to those charged by many other airports using residual or hybrid methodologies.

Respondents, using a compensatory methodology, charge a landing fee of \$0.70 per 1000 pounds of landed weight at Grand Rapids. At LAX, also using a compensatory methodology, the City of Los Angeles currently charges a landing fee of \$1.56 per 1000 pounds of landed weight for signatories to operating permits. The following table shows 1991-92 landing fees of various major hub airports in the U.S.:

approximation of cost of providing facilities) (citing *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 712-14 (1972)), cert. granted, 113 S. Ct. 2926 (1993); *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. 1112, 1120 (W.D. Mich. 1990) (rates and charges based on airlines share of operating expenses found reasonable), aff'd in part and rev'd in part, 955 F.2d 1054 (6th Cir. 1992), cert. granted, 113 S. Ct. 2926 (1993); *City and County of Denver v. Continental Airlines, Inc.*, 712 F. Supp. 834, 839 (D. Colo. 1989) (rejecting argument that exclusion of concession revenues in consideration of landing fees is unreasonable); *Raleigh-Durham Airport Authority v. Delta Air Lines, Inc.*, 429 F. Supp. 1069, 1079 (D. N.C. 1976) (multiple cash register method is "useful and reasonable tool whose proper application can produce a useful and reasonable result.") But see *Indianapolis Airport Auth. v. American Airlines*, 733 F.2d 1262 (7th Cir. 1984).

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AIRPORT	TOTAL PASSENGERS	METHODOLOGY	LANDING FEES (Per 1,000 lbs.)	
			(Signatory)	(Non-Signatory)
Boston Logan Int'l	21,451,858	Compensatory		1.69
Dallas Ft. Worth	48,198,208	Residual	1.75	2.00
Detroit Wayne Cty.	20,704,555	Residual	1.80	2.70
Houston Intercont'l	18,117,113	Hybrid	1.54	1.54
Kennedy Int'l	26,300,000	Compensatory	2.21	2.21
La Guardia	19,700,000	Compensatory	3.27	3.27
Lambert-St. Louis	19,151,278	Compensatory	1.20	1.50
Newark Int'l	22,300,000	Compensatory	2.27	2.27
O'Hare Int'l	59,787,000	Residual	1.89	2.36

AIRPORT	TOTAL PASSENGERS	METHODOLOGY	LANDING FEES (Per 1,000 lbs.)	
			(Signatory)	(Non-Signatory)
Philadelphia Int'l	15,041,935	Other	1.37	1.49
Phoenix Sky Harbor	22,140,437	Compensatory	0.93	0.93
Seattle-Tacoma Int'l	16,313,289	Residual	1.98	1.98
Washington Dulles	10,970,899	Hybrid	2.16	2.70
				∞

Source: American Ass'n of Airport Executives, 1991-92 Rates and Charges Survey.¹

¹ This survey also shows that Respondents' landing fees are less than or comparable to those charged at many small hub airports, including Baton Rouge Metro. (\$1.45); Birmingham (\$1.06); Albany County (\$0.79); Cedar Rapids Mun. (\$0.93); Dayton Int'l (\$1.28); Fairbanks Int'l (\$0.82); and Harrisburg Int'l (\$1.10).

The Air Transport Association of America ("ATA"), presents figures and a chart to argue that landing fees are unreasonable because airport costs have risen faster than air fares and other airline operating costs. See Brief of Air Transport Association of America as *Amicus Curiae* in Support of Petitioners, at 7-8 ("ATA Brief"). However, the figures and chart are misleading. It is totally inappropriate to compare trends in landing fees with trends in air fares and other airline operating costs because air fares and other airline costs are highly dependent on fuel costs. As the ATA itself notes, fuel prices (which represent a substantial portion of airline costs) declined by 36% during the same period. *Id.* at 7. Air fares have also declined because airlines have engaged in fare wars and have charged air fares substantially below costs, resulting in massive losses for the industry in recent years.

Finally, landing fees constitute only about two percent of total airline operating expenses. See *The Airline Monitor*, Sept. 1993, at F2 (chart showing operating expenses for major airlines in 1992). The ATA's suggestion that increased landing fees are responsible, even in part, for the problems facing the airline industry is without merit.

C. Because It Allows Airports To Fund Capital Improvements With Earnings From Non-Airline Tenants, The Compensatory Methodology Serves Congress' Goal That Airports Become "As Self-Sustaining as Possible."

The compensatory methodology allows airports to use their revenues from non-airline tenants to fund capital improvements. As a result, the compensatory methodology enables airports to reduce their reliance on federal funding—a goal Congress sought to promote when enacting federal funding legislation. The Airport and Airway Improvement Act ("AAIA")² specifically requires airport owners or operators receiving federal grants to "maintain

² Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248,

a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible"⁶ Moreover, Congress has recognized that concession revenues are an important source of funding for the capital needs of airports, and that airports that generate substantial concession revenues are more able to be self-sustaining.⁷

Retained earnings from concession revenues permit airports to be less burdened by local debt. Indeed, as the district court below observed, prudent management of surpluses "allows the Airport to run efficiently and with foresight thereby avoiding the necessity of seeking extra tax or bond revenues from the citizens of [the community] for expansion or improvement." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. at 1120. While airlines may have chosen to meet their capital needs by taking on massive debt, airlines have no right to presume that airports should place themselves in a similarly vulnerable financial position.

The ATA's amicus brief states that, for the calendar year 1991, some of the nation's largest airports earned substantial revenues in excess of their operating expenses. See ATA Brief, at 9. The ATA asserts that airport revenues in excess of operating costs are "windfalls" that are indicative of "unreasonable landing fees."⁸ See *id.* at

tit. V, 96 Stat. 671 (codified, as amended, at 49 U.S.C. app. 2201 *et seq.* (1988)).

⁶ 49 U.S.C. app. 2210(a)(9) (1988).

⁷ See S. Rep. No. 12, 93d Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.A.N. 1434, 1440 (report accompanying Anti-Head Tax Act) (large hub airports are more self-sustaining because landing fees and concession revenues allow them to cover both operational expenses and to underwrite needed capital investment borrowing).

⁸ On the basis of a press report, the ATA speculated that the City of Los Angeles seeks to use revenues generated at LAX for the City's general expenses. ATA Brief, at 5 & n.5. However, the ATA in its

8-9. To the contrary, profits from non-airline tenants allow airports to fund at least part of their improvements and expansion without burdening federal, state and local taxpayers, and allow airports to reduce their debt burden. In addition, revenues in excess of expenses provide reserves for emergency repairs and replacements. Finally, if airports are unable to retain and use profits from non-airline tenants, airports will lack incentive to develop new concessions and other non-airline sources of revenue.

The airlines' argument erroneously assumes that new capital improvements and expansion of existing facilities are not needed for operations. The argument ignores the tremendous growth in airport passengers and the necessity to accommodate this growth. It is non-airline profits that allow airports to sustain themselves by becoming increasingly independent of federal funding, local debt and airline control.⁹

suit against the City of Los Angeles failed to allege any claim of diversion. Instead, the ATA was forced to concede that "[d]efendants apparently recognize that they may not divert airport revenues to the City's General Fund unless and until numerous federal laws, grant assurances, and bond covenants are changed." Complaint for Declaratory and Injunctive Relief ¶ 61, *Air Transport Ass'n of America v. City of Los Angeles*, No. CV 93-4539-AWT (filed July 30, 1993).

⁹ Petitioners suggest that the Court's determination of whether landing fees are reasonable should be based on an evaluation of the specific airports purposes to which revenues received from non-airline tenants are put. The Petitioners have no basis to question the purposes for which airport owners may choose to apply non-airline revenues.

II. THERE IS NO LEGAL OR POLICY BASIS FOR FINDING THAT AIRLINES MUST RECEIVE THE ECONOMIC BENEFIT OF AN AIRPORT'S CONCESSION REVENUES.

A. The Courts Have Deferred To Rate-Making Bodies On Issues of Rate-Making Methodology.

Historically, federal courts have declined to involve themselves in issues of rate-making methodology. Rate-making, including the cost allocation component of rate-making, "is essentially a legislative function." *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945). This is so because "[a]llocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Id.*, quoted in *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 825 (1983).

Courts considering the AHTA have uniformly observed that Congress did not intend that courts perform a rate-making function by deciding what methodology airports must use in setting landing fees.¹⁰ Accordingly, the Sixth

¹⁰ See, e.g., *Northwest Airlines, Inc. v. County of Kent, Michigan*, 955 F.2d at 1066 (Nelson, J. concurring in part and dissenting in part) (In the absence of a statutory cost-allocation formula, the courts have "no warrant to require the use of one acceptable method in preference to another.") (citing *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945)); *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262, 1270 (7th Cir. 1984) ("the powers of a federal court in regulating rates are more limited than those of an administrative agency. We can invalidate an unreasonable rate, but we cannot fix the reasonable rate; that is a legislative or administrative rather than a judicial function.") (citing *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362, 397-98 (1894)); *City and County of Denver*, 712 F. Supp. at 839 ("Nothing in the history and purpose of [the AHTA] indicates that Congress intended the courts to act as a public utility commission and intervene in the setting of airport rates and charges through the adoption or rejection of any particular type of cost accounting methodology.").

Circuit below properly deferred to airport proprietors "as long as they act within a broad range of reasonableness." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 955 F.2d at 1060 (citing *Evansville*, 405 U.S. at 712-14).

B. The Department Of Transportation Has Accorded Airports Broad Discretion In Rate Setting And Has Construed The AHTA As Only Prohibiting Head Taxes Or Their Equivalents.

As a matter of policy, the Department of Transportation ("DOT") has given airports "wide latitude in selecting a particular rate methodology and fee structure." Brief for the United States as *Amicus Curiae*, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, at 8, *Northwest Airlines, Inc. v. County of Kent, Michigan*, United States Supreme Court No. 92-97. With specific reference to the AHTA, the DOT, in its decision with respect to landing fees at Boston's Logan International Airport, found that:

Congress, when it passed the Anti-Head Tax Act (49 U.S.C. 1513), sought to prevent the imposition of taxes by local authorities on passengers traveling in air commerce Both the language and legislative history of the Anti-Head Tax Act indicate that Congress was concerned in that statute only with prohibiting head taxes or their equivalents. *Cf.*, *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983).

Investigation Into Massport Landing Fees, FAA Docket 13-88-2 (Dec. 22, 1988) (Decision of Deputy Secretary of Transportation), *aff'd*, *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 170 (1st Cir. 1989).

Similarly, both the DOT and the Federal Aviation Administration have concluded that fees charged car rental companies by an airport are not within the purview of the AHTA, because the statute is

limited in application to situations involving carriage by aircraft. Since non-aeronautical off-airport service providers are not engaged in carriage by aircraft they are considered outside the protection of [the AHTA] and, consequently, a gross receipts fee imposed upon them by an airport authority is not prohibited.

Letter from FAA Administrator Donald D. Engen to Senator Mark Andrews (Feb. 1, 1985), contained in "A Review of The Imposition of Gross Receipts Fees on Off-Airport Car Rental Companies," U.S. Department of Transportation, Report to the Senate Committee on Appropriations, the Senate Committee on Commerce, Science and Transportation, the House Committee on Appropriations, and the House Committee on Public Works and Transportation, App. B. at 84 (Apr. 1989).

Petitioners are, thus, urging this Court to adopt a construction of the AHTA which is contrary to that given it by the agency charged with its administration. Since the DOT's construction of the AHTA prohibits only "head taxes or their equivalents," and that construction is clearly reasonable, accepted principles of deference to agency interpretation require rejection of Petitioner's contrary construction of the AHTA. See *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).

C. Concession Revenues Do Not Constitute An Indirect Tax On Air Travelers.

The legislative history of the AHTA also makes clear that, whether direct or indirect, fees do not fall within the prohibitions of the statute unless they qualify as head taxes, calculated as a flat rate, per air passenger. "The head tax imposes a flat rate on passengers, regardless of the distance traveled by the passenger." S. Rep. No. 12, *supra*, 1973 U.S.C.C.A.N. at 1451. By using the phrase "indirect"

taxes, Congress sought only to prohibit both the airport and the airlines from collecting a per passenger charge.

Whether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel

If the passenger *must* pay a local head tax, it adds directly to the cost of his trip. And if head taxes are absorbed by the carriers, where law permits, because of the cost and difficulty of collection, or even refusal of passengers to pay, it still will lead to increased air travel costs In the end, a fare increase would have to be implemented. Thus, the air passenger loses either way on state and local head taxes.

Id. at 1451 (emphasis added).

As was the case with the courts below, courts addressing this issue have concluded that non-airline revenues are not within the scope of the AHTA.¹¹

To interpret "indirect" taxes to include airport concession revenues would require an extension of the AHTA's protections beyond the class of persons the law was designed to protect. It is clear from the legislative history "that in enacting § 1513 Congress was solely concerned with the adverse effects local taxes were having on the public's right to travel" *Interface Group, Inc. v. Massachusetts Port Auth.*, 631 F. Supp. 483, 494 (D. Mass.

¹¹ See *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. at 1117, ("nonairline concession revenues are not within the scope of the AHTA"); *City and County of Denver*, 712 F. Supp. at 836-37 ("Read literally, the Anti-Head Tax Act has no application to . . . concession revenues."); see also *Salem Transp. Co. v. Port Auth.*, 611 F. Supp. 254, 257 (S.D.N.Y. 1985) (phrase "air transportation" does not apply to ground transportation); *State ex rel. Arizona Dep't of Revenue v. Cochise Airlines*, 128 Ariz. 432, 437 (Ariz. Ct. App. 1980) (phrase "air commerce" does not include transportation of freight).

1986), *aff'd in part and vacated in part*, 816 F.2d 9 (1st Cir. 1987). Accordingly, the statute and congressional comments are replete with references to air travelers as the intended beneficiaries of the statute.¹²

Airport concession revenues do not implicate the right to travel. These revenues are not derived solely from air passengers, but also from non-passengers. Both groups use airport concessions as consumers exercising individual choices. Concession users can choose public transit, or taxis, over car rental and parking fees. They can eat, drink and shop before going to, or after leaving, the airport. They may choose to do these at the airport because, as consumers, they are willing to pay a premium for convenience.

The AHTA is not designed to shield consumers from paying the market premium for convenience. As noted by the Colorado district court, and by the lower courts in this case, the airport's decision to operate concessions at a profit is outside the purview of the AHTA because it "is not an exploitation of airline passengers who have the freedom of choice to use the amenities [the airport] has provided." *City and County of Denver*, 712 F. Supp. at 838-39; *accord Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. at 1118; *Northwest Airlines, Inc. v. County of Kent, Michigan*, 955 F.2d at 1061.

In contrast, head taxes by their nature are assessed on all captive air travelers, and cannot be avoided.¹³

¹² See, e.g., S. Rep. No. 12, *supra*, 1973 U.S.C.C.A.N. at 1450 ("Congress . . . established a uniform national program of taxation and funding for airport improvements. This Committee never intended that air travelers would be subject to state and local head taxes as well as to national user charges. The Committee believed there was no danger of this because the basic constitutional guarantee of a citizen's right to unhindered interstate travel, and a U.S. Supreme Court decision which had prevailed since 1867, indicated that such taxes could not be constitutionally imposed").

¹³ The Seventh Circuit concluded that it should be a matter of indif-

D. There Is No Basis For Requiring That Concessionaires Share In The Costs Of Airside Operations.

Petitioners argue that concessionaires should share in the costs of airside operations because, in effect, the airlines create the market of concession customers. Petitioners ignore, however, the fact that concession customers include individuals who are not air travelers. Large airports and airports in urban areas may attract people who live or work in the vicinity of the airport to specialty retail facilities or restaurants and, indeed, airport operators now increasingly provide retail establishments for surrounding residents.

At LAX, the 50,000 people who work at the airport also use its facilities. Business people frequently use its meeting facilities. Additionally, particularly at hub airports, friends, relatives, and acquaintances of travelers often use airport facilities while meeting air passengers.

Nevertheless, even if all concession customers were also passengers, Petitioner's argument proves too much. In effect, the airlines are claiming a right to share in the economic activity of air passengers before and after they travel, simply because airline transportation services deliver customers to the activity. In fact, the airlines also deliver passengers to the city's businesses and tourist attractions. By the airlines' logic, because the proprietors of

ference to a traveler "whether he pays \$100 for the ticket, \$10 in head tax and \$30 for parking; or \$120 for the ticket and \$20 for parking, with no head tax. What matters to him is the total cost that he *must* incur to make the flight, rather than the form in which the cost is distributed among the various items he *must* buy." *Indianapolis*, 733 F.2d at 1268 (emphasis added). The Seventh Circuit's reasoning is flawed because it ignores the fact that the traveler does not have to pay the parking charge to take the flight. In Los Angeles, an air traveler who wishes to park at LAX has an even greater choice, because there are numerous private off-site parking facilities that are alternatives to the airport's parking facilities.

the area's tourist attractions and businesses benefit from airside operations, they also should be required to share in the costs of airside operations.

The airlines urge a self-serving notion of market-making and benefit. If an airport were located in the middle of the ocean, few passengers would fly there. It is the municipality that an airport serves, including its business and commercial enterprises, tourist attractions and people, that is responsible for the market of customers for both the airlines and the concessionaires. Indeed, if all economic players were required to share costs based on benefits they confer upon each other, the airlines would have to share in municipal costs because it is the municipality that creates, at least in part, a market for airline passengers.

Even if, however, concessionaires benefit from airside operations in the manner claimed by the airlines, the law does not require airside costs to be allocated to concessionaires. Cases addressing the proper allocation of costs under the AHTA require at most that the amounts charged to the airlines not be excessive in light of the benefits conferred by the airport on the airlines.¹⁴ These decisions do not require an airport to undertake cost allocations which consider those benefits conferred by one airport user on another, or other ethereal "benefits" subjectively determined by the airlines.

¹⁴ See *Evansville*, 405 U.S. at 716-17 (charges may not be "excessive in comparison with governmental benefit conferred."); accord *Northwest Airlines, Inc. v. County of Kent, Michigan*, 955 F.2d at 1061; *American Airlines, Inc. v. Massachusetts Port Auth.*, 560 F.2d 1036, 1037-38 (1st Cir. 1977); *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. at 1120; *City and County of Denver*, 712 F. Supp. at 839 (rejecting argument that exclusion of concession revenues in consideration of landing fees is unreasonable.).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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September 1993

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC., USAIR,
INC., AMERICAN AIRLINES, INC., AND UNITED AIRLINES,
INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS, AND THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL BUSINESS AIRCRAFT
ASSOCIATION, INC., NATIONAL AIR
TRANSPORTATION ASSOCIATION, INC. AND
HELICOPTER ASSOCIATION INTERNATIONAL, INC.
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Petitioners,

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COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
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Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF OF NATIONAL BUSINESS AIRCRAFT
ASSOCIATION, INC., NATIONAL AIR
TRANSPORTATION ASSOCIATION, INC. AND
HELICOPTER ASSOCIATION INTERNATIONAL, INC.
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

This brief is submitted in support of the position of Respondents on the questions presented.¹

¹ Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

INTEREST OF THE AMICI CURIAE

The National Business Aircraft Association ("NBAA") is a non-profit corporation incorporated and based in Washington, D.C. NBAA represents business aviation before government agencies and the U.S. Congress and, in selected cases of importance, represents its members' interests by initiating or participating in court actions.

NBAA has approximately 3,200 member companies flying more than 5,200 general aviation aircraft.² Other members are companies which derive fifty percent or more of their revenues from business aviation (such as certain business aircraft manufacturers and fixed-base operators). NBAA members operate aircraft to and from the Kent County International Airport (the "Airport").

The National Air Transportation Association ("NATA") is a Maryland non-profit corporation based in Alexandria, Virginia. NATA represents the business interests of aviation companies on legislative and regulatory matters at the federal level.

NATA was created in 1940 and has nearly 2,000 members, primarily small businesses. NATA members provide fuel and line services, on-demand air charters, aircraft sales, flight training, maintenance, avionics, instruments, and other technical services. NATA members include both general aviation aircraft operators and companies which provide equipment and services to such operators and to commercial airlines as well. The three fixed-base operators at the Airport are NATA members.

The Helicopter Association International ("HAI") is a Delaware non-profit corporation based in Alexandria, Virginia. HAI was founded in 1948 and has over 1300 member com-

² "General aviation aircraft are corporate aircraft and privately-owned aircraft that are not in commercial, passenger, cargo or military service." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. 1112, 1114 (W.D. Mich. 1990).

panies, primarily small businesses. HAI's objectives are to increase safety in all aspects of civil helicopter activities and public acceptance of helicopters as safe, economic and practical vehicles.

HAI's regular members operate civil helicopters in commercial, corporate and public service. Collectively, these members operate 4,000 civil helicopters and fly more than 2,000,000 hours annually. HAI's associate members manufacture helicopters, engines and components, and service, repair, sell, finance, insure, and otherwise support the civil helicopter industry. HAI members operate helicopters to and from the Airport.

SUMMARY OF ARGUMENT

Petitioners argue that, as a matter of law, general aviation at the Airport must be charged 100% of its allocated costs, *i.e.*, the general aviation fees at the Airport must be increased more than fivefold.³ Petitioners argue that this is the necessary and logical result of the Commerce Clause and the Anti-Head Tax Act, 49 U.S.C. App. § 1513 (the "AHTA"). NBAA, NATA and HAI, to the contrary, submit that neither the Commerce Clause nor the AHTA require that airline and general aviation fees be homogenized and that the fee schedule at the Airport is lawful and rational.

1. The AHTA is a single purpose statute which does not explicitly or implicitly serve as a proxy for the Commerce Clause. Either airlines or general aviation can invoke the AHTA to attack user charges on their passenger operations to the extent that such charges are disguised head taxes, *i.e.*, to the extent that such charges are too high with respect to their allocated costs or produce revenues which will be diverted away from airport uses.

³ The District Court found that the fees assessed general aviation (a \$.04 per gallon fuel flowage fee and a landing fee for itinerant aircraft) brought in revenues of less than \$125,000 per year compared to costs of \$650,000 allocated to general aviation. *Northwest Airlines*, 738 F. Supp. at 1116.

Neither the airlines nor general aviation can invoke the AHTA to attack the user charges assessed against each other or against other airport users.

2. Even if the application of the Commerce Clause is not foreclosed by the AHTA - and NBAA, NATA and HAI take no position in that regard - there is no basis for mandating an increase in general aviation fees on constitutional grounds. There is nothing in the record which indicates that those fees represent unreasonable discrimination in favor of intrastate commerce. General aviation at the Airport does not compete with the airlines for passengers and is not, in any event, predominately intrastate in nature. Moreover, there are rational explanations for the different measure and level of general aviation fees which do not implicate any intent to burden the airlines.

ARGUMENT

I. THE ANTI-HEAD TAX ACT IS NOT A PROXY FOR THE COMMERCE CLAUSE AND CANNOT BE USED TO HOMOGENIZE THE CHARGES IMPOSED ON VARIOUS CLASSES OF AIRPORT USERS.

The AHTA addressed a specific problem: in the judgment of Congress, the *per capita* fees imposed by certain airports upon passengers departing on commercial airlines, although allowed by *Evansville-Vanderburgh Airport Authority District v. Delta Air Lines, Inc.*, 405 U.S. 707 (1972), were too high. By raising the cost of air travel, "this added cost could make air travel uneconomical for some people, and thus inhibit the growth of the air transportation system, particularly in short-haul markets." S. Rep. No. 12, 93d Cong., 1st Sess. *reprinted in* 1973 U.S.C.C.A.N. 1434, 1451. There also was a concern that "if head taxes are to be used for non-aviation purposes, or

for programs which don't benefit the airport system where it is collected, such taxes are not equitable." *Id.*

The AHTA resolved this problem by prohibiting the imposition of all direct and indirect local head taxes on passengers carried by general aviation in "air commerce" and by airlines in "air transportation."⁴ 49 U.S.C. App. § 1513(a). Since a blanket prohibition against local airport charges could prohibit airport authorities from collecting traditional user charges, a provision was added excluding from this prohibition "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. § 1513(b).

To the extent that the AHTA addresses any form of local airport charge other than a head tax, it requires only that such a charge be "reasonable." In the context of the statute, a user charge which is not "reasonable" can only mean a charge on the carriage of passengers⁵ which is a head tax in disguise, *i.e.*, a charge which is too high in relation to allocated costs or is

⁴ The AHTA was enacted as Section 1113 of the Federal Aviation Act of 1958. 49 U.S.C. App. § 1513. The definitional scheme of the Federal Aviation Act provides, first, for "air commerce," defined in pertinent part as the carriage of passengers or property by aircraft for compensation or hire, or the operation of aircraft in the conduct or furtherance of a business or vocation, or the operation of aircraft within any federal airway, or any other operation of aircraft which directly affects, or which may endanger safety in, interstate, overseas or foreign air commerce. 49 U.S.C. App. §§ 1301(4) and 1301(23). This is a definition which encompasses all non-military aircraft operations within the U.S., and it is the basis for, *inter alia*, the regulation of general aviation operations. See 14 C.F.R. Part 91. The term "air transportation" is more narrowly drawn, encompassing carriage for transportation or hire as a common carrier. 49 U.S.C. App. §§ 1301(10) and 1301(24). This is the term which describes the commercial airlines.

⁵ It is possible that some of the general aviation and airline operations at the Airport are cargo flights. Such operations are plainly outside the AHTA. However, there is nothing in the record speaking to this distinction.

intended to produce revenues for other than airport uses. If a charge does not have either feature, it is *per se* "reasonable" under the AHTA.

Petitioners nonetheless argue that the term "reasonable" imports into the AHTA a Commerce Clause analysis which includes considerations of discrimination vis-à-vis each class of airport user. Under this argument, even if a particular airport user charge is not so high relative to the appropriate costs as to create a disguised head tax, it may be "unreasonable" under the AHTA if it is too high relative to charges assessed other users.

There is no support for this argument either in the text of the statute or its legislative history. The AHTA banned charges allowed by the Court's decision in *Evansville*. It did not, either expressly or implicitly, adopt the Court's Commerce Clause analysis in that case as the standard to be applied in excepting normal user charges from the head tax prohibition. The term "reasonable" is a limitation on an exception, not a broad mandate to control all user charges imposed by airports.

Petitioners' argument is also inconsistent with the ultimate relief they seek (or should be seeking) - a lowering of the fees assessed the airlines. If the AHTA requires the airline and general aviation fees to be homogenized, raising the general aviation fees fivefold will not lower by one cent the costs, and thereby the fees, allocated to the airlines. Petitioners strain to close this gap by asserting that the AHTA also prohibits the Airport from maximizing revenues received from concessionaires, *i.e.*, concession revenues must be used to cross-subsidize the airlines, and that if concession revenues are held steady while general aviation fees are increased, there will be more money in the pool⁶ to apply against the airline's costs. The

⁶ Although Petitioners argue for a pooling of all airport revenues for the benefit of the airlines, they do not suggest that the AHTA requires airports to use the alternative residual cost methodology for assessing charges, a methodology which pools the risks as well as the rewards of an airport operation. See *Northwest Airlines*, 738 F. Supp. at 1114.

contingencies aside, this reads a set of federal policy guidelines into the AHTA which are nowhere apparent on its face or in its history.

II. THE CHARGES ASSESSED ON GENERAL AVIATION ARE *PRIMA FACIE* REASONABLE. THERE IS NO EVIDENCE THAT GENERAL AVIATION AT GRAND RAPIDS COMPETES WITH THE AIRLINES OR THAT IT IS INTRASTATE IN NATURE. THERE ALSO ARE RATIONAL EXPLANATIONS FOR THE CHARGES OTHER THAN AN INTENT TO DISADVANTAGE THE AIRLINES.

Contrary to Petitioners' assertion, the Airport fee schedule is not discriminatory on its face. Under a Commerce Clause analysis, "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978).⁷ A claim of facial discrimination requires a showing, at a minimum, that (i) the alleged beneficiary of the discrimination is a class of intrastate companies (ii) which competes with the allegedly burdened class of interstate companies⁸ and (iii) the discrimination cannot be explained by "a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 112 S.Ct. at 800. Not one of these prerequisites is present in this case.

1. Petitioners ask the Court to assume that general aviation operations at the Airport are predominately intrastate in nature.⁹ There is nothing in the record to support that assumption.

⁷ NBAA, NATA and HAI take no position on whether a Commerce Clause analysis is appropriate in this case in the first instance.

⁸ *Wyoming v. Oklahoma*, 112 S.Ct. 789, 800 (1992); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269-70 (1984); cf. *Exxon Corp.*, 437 U.S. at 126.

⁹ Judge Posner made a similar assumption with respect to the Indianapolis airport in *Indianapolis Airport Authority v. American Airlines*,

tion. To the contrary, the record reflects a large and diverse general aviation population at the airport, one that presumably is more than willing to venture beyond the state line. *Northwest Airlines*, 738 F. Supp. at 1114. Similarly, it is probable that the Airport is a destination for many general aviation operations originating out-of-state.

2. Petitioners also ask the Court to assume that general aviation and the airlines compete for passengers at the Airport. Again, there is no basis in the record for this assumption. The record does show that while there are two small corporate jets based at the Airport, there are also over 160 smaller private aircraft. *Northwest Airlines*, 738 F. Supp. at 1114. These aircraft in total are capable of carrying relatively few passengers, not significantly more than a single large commercial airliner. There is no evidence of interchangeability or cross-elasticity of demand for the services offered by these disparate types of aircraft.

The existence of competition between the intrastate and interstate classes is an essential element of a Commerce Clause discrimination claim. The "economic protectionism" prohibited by the Commerce Clause is directed at "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, 112 S.Ct. at 800 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988)). The absence of this competitive linkage makes it impossible for the offending measure to have the purpose and effect of discrimination. Absent competitive linkage, there is also no basis for assuming that the purpose and effect of the measure is to cause passengers to use general aviation rather than commercial airlines. As a practical matter, there is no motive for the Airport to discriminate against the commercial airlines in favor of general

Inc., 733 F.2d 1262, 1271 (7th Cir. 1984). There is no indication in that opinion as to the basis for that speculation.

aviation. See *Amerada Hess Corp. v. N.J. Taxation Division*, 490 U.S. 67, 77 (1989) (holding that a state tax did not violate the Commerce Clause on the grounds that, *inter alia*, the state did not have any motive to discriminate against out-of-state companies).

Competitive linkage, among other factors, distinguishes the cases relied upon by Petitioners. In *Bacchus Imports*, the central finding was that the locally-produced alcoholic beverages exempted from the tax were in competition with the alcoholic beverages produced out-of-state and subject to the tax. As the Court noted, "[t]he State's position that there is no competition is belied by its purported justification of the exemption in the first place." 468 U.S. at 269. In *Wyoming v. Oklahoma*, the offending measure, an Oklahoma law requiring utilities to purchase at least ten percent of their coal from in-state sources, caused the Oklahoma utilities' purchase of in-state rather than out-of-state coal to increase by nearly that amount. In *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009 (1992), and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 112 S.Ct. 2019 (1992), the out-of-state waste haulers competed with in-state companies for the use of the same landfills.

3. Even if general aviation and the airlines were, respectively, intrastate and interstate competitors, the offending measure would not amount to actionable discrimination since there is a rational explanation for the measure other than an intent to protect in-state interests. All other factors being equal, "[a] law exhibiting the intent to impose a compensatory fee for . . . a legitimate purpose is *prima facie* reasonable" under the Commerce Clause. *Great Northern Ry. Co. v. State of Washington*, 300 U.S. 154, 160 (1937).

The Court found in *Evansville* that a discrepancy in charges between airlines and general aviation was reasonable. The challenged head taxes applied only to passengers departing on

large commercial airlines. They did not apply to general aviation passengers, arriving passengers, certain classes of passengers such as the military, and passengers on charters and air taxis. Thus, distinctions were made, but they did not amount to actionable discrimination because "these charges reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." 405 U.S. at 717. Focusing specifically on general aviation, the Court stated:

Commercial air traffic requires more elaborate navigation and terminal facilities, as well as longer and more costly runway systems, than do flights by smaller private planes. Commercial aviation, therefore, may be made to bear a larger share of the cost of facilities built primarily to meet its special needs, whether that additional charge is levied on a per-flight basis in the form of higher takeoff and landing fees, or as a toll per passenger-use in the form of a boarding fee. In short, distinctions based on aircraft weight or commercial versus private use do not render these charges wholly irrational as a measure of the relative use of the facilities for whose benefit they are levied.

405 U.S. at 718-19.¹⁰

The *Evansville* reasoning aside, there are at least two other reasons for the different treatment accorded the airlines and general aviation: (a) the historic distinction between common carriers and private carriers; and (b) the demand elasticity curve for general aviation.

¹⁰ The discrimination alleged in this case is even less compelling than that alleged in *Evansville*. In this case, the Airport, acting consistently with the AHTA, has isolated the costs attributable to general aviation and assured the users, to the apparent satisfaction of the Petitioners (who do not contest this part of the allocation), that the airlines do not subsidize general aviation.

a. The distinction between common carriers, *i.e.*, carriage for compensation or hire, and private carriage is the common thread in all forms of transportation regulation. Under the federal scheme, general aviation, which comprises the bulk of private carriage by air, is subjected to regulatory requirements which are much less intrusive than those imposed on the airlines.¹¹ The point is that the federal government, in effect, discriminates between the airlines and general aviation on a daily basis with no express or implied intent to burden one vis-à-vis the other.

By subjecting general aviation to a different measure and level of fees at the Airport, the Airport is doing no more than what the federal government does — recognizing that there are substantial, if non-quantifiable, differences between the two classes of operators.

b. General aviation aircraft owners and pilots have many more airport options than airlines. Almost any airport can accept general aviation operations. However, only a relatively small number of airports are certificated to handle airline operations. While the existence of certificated airports at Lansing and Kalamazoo does provide Grand Rapids airline passengers with some alternatives, *Northwest Airlines*, 738 F. Supp at 1117, there are many more general aviation-qualified airports in the area.

¹¹ Compare 14 C.F.R. Part 91 (operating and flight regulations applicable to general aviation) with 14 C.F.R. Part 121 (operating and certification regulations applicable to common carriers) and 14 C.F.R. Part 200 *et seq.* (economic regulations applicable to common carriers, including, for example, regulations regarding certificates of public convenience and necessity (Part 206), a uniform system of accounts and reports (Part 241), overbooking of flights (Part 250), smoking aboard aircraft (Part 252), domestic baggage liability (Part 254), and computer reservation systems (Part 255)).

If general aviation fees were increased at the Airport fivefold, many general aviation operations would undoubtedly move to other airports in the region.¹² If the present fuel flowage fee were increased fivefold, aviation users would be paying an additional twenty cents per gallon for fuel at the Airport, a sufficient incentive for any user to find less expensive places to refuel. To the extent that general aviation operations declined, of course, Airport revenues would be decreased. It is quite possible that the current schedule of charges for general aviation is the point at which revenues are maximized, but the Court need not engage in "complex factual inquiries about such issues as elasticity of demand" for a Commerce Clause analysis. *Commonwealth Edison Co v. Montana*, 453 U.S. 609, 619 n.8 (1981). As *Evansville* teaches, it is enough that there is an alternative rational explanation for the difference in fees. The obvious difference in the elasticity of demand between airlines and general aviation clearly provides the requisite element of rationality.

¹² Many fee disputes involving general aviation center on fees which are raised for the purpose of forcing general aviation to use other airports. For example, in *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 161-62 (1st Cir. 1989), the airport operator imposed a fee schedule which raised general aviation fees at Boston's Logan Airport by approximately 300 percent with the intention of forcing general aviation to use reliever airports in the area.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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September 22, 1993

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., *et al.*,
Petitioners,
v.
COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the
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NATIONAL ASSOCIATION OF COUNTIES,
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IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether airlines have a private right of action to challenge the reasonableness of airport user fees and rental charges under the Anti-Head Tax Act.
2. Whether airport user fees and rental charges are reviewable under the dormant commerce clause.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-97

NORTHWEST AIRLINES, INC., *et al.*,
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v.
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Respondents.

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LAW OFFICERS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. State and local governments operate nearly all of the nation's airports providing commercial passenger services and have made substantial fiscal investments in them. *Amici's* members will thus be directly affected by the resolution of the issues presented in this case.

The Court is called upon to address the applicability of the Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513, and the dormant commerce clause, to the fees and charges collected by the nation's airports for the provision of services such as the use of runways and terminals. Petitioners' asserted rights of action would interject the federal courts into disputes over these matters in derogation of the carefully crafted partnership between the Secretary of Transportation and the States created to develop the nation's airports. Recognition of petitioners' asserted rights of action will threaten the fiscal health of the nation's airports and their ability to make capital improvements to their facilities. Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.¹

SUMMARY OF ARGUMENT

1. The AHTA's text, structure and legislative history demonstrate that it does not provide a private right of action to challenge the reasonableness of respondents' rental charges and user fees. In response to this Court's decision in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which upheld an airport charge on each enplaning passenger against a commerce clause challenge, Congress enacted the AHTA for the limited purpose of prohibiting head taxes and their equivalents. Accordingly, section 1513(a) prohibits States and their subdivisions from "levy[ing] or collect[ing] a tax, fee, head charge, or other charge directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." 49 U.S.C. App. § 1513(a). As the Court has recognized, subsection (a) is a limited preemption provision. *Aloha Airlines, Inc. v. Director of Taxation of Haw.*, 464 U.S. 7, 12 n.6 (1983). Petitioners' assertion that

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

the AHTA "prohibits all 'unreasonable' user fees on aircraft operators," Pet. Br. 21, is plainly contradicted by the text of subsection (a), which does not contain "unreasonable user fees" or any similar formulation in its enumeration of prohibited taxes and fees. See 49 U.S.C. App. § 1513(a). If, in enacting the AHTA, Congress had intended to provide a private right of action to challenge unreasonable user fees or rental charges, it would have inserted appropriate language into subsection (a).

Nor does subsection (b) authorize judicial challenges to the reasonableness of airport fees and rental charges. As its heading states, § 1513(b) affirmatively sets forth "[p]ermissible [s]tate taxes and fees," 49 U.S.C. App. § 1513(b); it does not, unlike § 1513(a), set forth a "prohibition" of state taxes and fees. Accordingly, if, in enacting the AHTA, Congress had intended to prohibit unreasonable user fees and rental charges, the natural place to have done so would have been in subsection (a) and not subsection (b).

Petitioners' reliance on Congress's insertion of the term "reasonable" into subsection (b)'s enumeration of permissible taxes and fees to authorize a private right of action to challenge airport user fees ignores the comprehensive background of aviation law against which the AHTA was enacted. Congress's purpose in inserting the term "reasonable" into subsection (b) was to reconcile subsection (b) with the project sponsorship assurance requiring an airport which accepts federal funding to "be available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. § 2210 (a)(1). Without the insertion of the term "reasonable" into § 1513(b), the AHTA could be read as superseding this project sponsorship assurance. Accordingly, the AHTA's text and structure make clear its limited purpose—to prohibit head taxes and their equivalents while leaving undisturbed the authority of the States and their subdivisions to levy and collect other airport taxes and fees.

The legislative history provides additional evidence of the AHTA's limited purpose. The AHTA was enacted

in response to this Court's decision in *Evansville* which upheld, against a commerce clause challenge, an airport charge on each enplaning passenger. As the Senate Report noted, such "head taxes" were "particularly annoying" as they caused "confusion, delay, anger and resentment" as ticket agents attempted to collect them. S. Rep. No. 12, 93d Cong., 1st Sess. 17, 21 (1973), reprinted in 1973 U.S.C.C.A.N. 1434, 1446, 1450. Congress also viewed them as "constitut[ing] an inequitable, double burden of taxation on air passengers." S. Rep. at 21, 1973 U.S.C.C.A.N. at 1450. Congress, however, expressed no reservation about airport rental charges and user fees, see generally *id.* at 17-26, 1973 U.S.C.C.A.N. 1446-55, and Congress's concerns about the imposition of head taxes are inapplicable to airport user fees and rental charges.

Petitioners' contention that the AHTA provides an implied private right of action also reflects a fundamental misunderstanding of the principles of federalism which this Court has articulated to guide the construction of ambiguous statutes affecting the States and their political subdivisions. Interjecting the federal courts as the rent control boards for the nation's airports on the basis of a single word—"reasonable"—in § 1513(b) would "alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2401 (1991) (citations omitted). Because the express terms of the AHTA neither provide for judicial enforcement of its provisions nor include unreasonable rental charges and user fees in the enumeration of prohibited taxes and fees, see 49 U.S.C. App. § 1513(a), Congress has not provided a plain and unambiguous statement of its intent to subject the States and their subdivisions to private suits challenging the reasonableness of airport rental charges and user fees.

2. Petitioners' commerce clause claim is also meritless. As both the AHTA and the Airport and Airway Improvement Act of 1982 (AAIA), Pub. L. No. 97-248, 96 Stat. 671 (1982) (codified at 49 U.S.C. App. § 2201 et seq.),

demonstrate, Congress has "manifest[ed] its unambiguous intent" to foreclose commerce clause review. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 802 (1992). In 1982, Congress amended the AHTA, adding subsection (d) which sets forth those "[a]cts which unreasonably burden and discriminate against interstate commerce." See Pub. L. No. 97-248, § 532(b), 96 Stat. at 701-02 (codified at 49 U.S.C. App. § 1513(d)). Significantly, Congress did not include unreasonable user fees and rental charges when it enumerated those acts which unreasonably burden commerce. See generally *id.*

Even more important, Congress specifically addressed the reasonableness of airport rental charges in the AAIA. Congress's enactment of the project sponsorship conditions, including the requirement that "the airport . . . be available for public use on fair and reasonable terms and without unjust discrimination," 49 U.S.C. App. § 2210(a)(1)—coupled with its enactment of a mechanism for enforcing violations of this provision, see 49 U.S.C. App. §§ 2210(b), 2218(a)—unambiguously demonstrate that in the area of airport user fees and rental charges, "Congress has struck the balance it deems appropriate [and] the courts are no longer needed to prevent States from burdening commerce." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

Moreover, judicial intervention under the commerce clause would undermine other aspects of Congress's carefully crafted scheme for the development of the nation's airports. As recently as 1990, Congress authorized the Secretary to grant public airports the authority to impose a charge of up to \$3.00 per enplaning passenger to finance airport projects. See Aviation Safety and Capacity Expansion Act of 1990, § 9110, Pub. L. No. 101-508, 104 Stat. 1388-353, 1388-357 (1990) (codified at 49 U.S.C. App. § 1513(e)). The Secretary has granted respondents the authority to impose this charge at their airport. *Passenger Facility Charge (PFC) Approvals and Disapprovals*, 57 Fed. Reg. 49108, 49109 (1992). The enactment of § 1513(e), coupled with the Secretary's

grant to respondents of the authority to impose this charge (which will raise twelve million dollars to finance runway improvements, *see id.*) firmly rebut petitioners' claims that the fees assessed here unreasonably burden commerce.

Finally, petitioners' claim would require an unprecedented expansion of dormant commerce clause doctrine to include actions taken by the States in their proprietary, as opposed to sovereign, capacities. The Court has recognized that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980). Accordingly, the Court has also held that "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* at 439.

As the district court found, the relationship between the airlines and airport "is one of landlord and tenant" which "manifests itself in leases entered into between the Airport and various users of the Airport." Pet. App. 26. Accordingly, in setting the fees and rents for the use of their facilities, respondents were engaged in the proprietary activity of renting their facility and not a sovereign function of taxing or regulating. *See* 49 U.S.C. App. § 1305(b) (recognizing proprietary powers of airport authorities). They are thus immune from a commerce clause challenge. *Reeves*, 447 U.S. at 439.

ARGUMENT

I. THE AHTA DOES NOT PROVIDE AN IMPLIED PRIVATE RIGHT OF ACTION TO CHALLENGE THE REASONABLENESS OF AIRPORT USER FEES AND RENTAL CHARGES

The gravamen of petitioners' claim is that subsection (b) of the Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513(b), "prohibits all 'unreasonable' user fees on aircraft operators." Pet. Br. 21. Petitioners' claim is necessarily premised on the threshold proposition—which was accepted by the court of appeals—that the AHTA provides commercial airlines an implied private right of action to challenge in the federal courts the reasonableness of airport rental charges and user fees.² *See* J.A. 18-20. The Court should reject petitioners' attempt to deputize the

² Petitioners assert that the issue of whether the AHTA provides a private right of action is not before the Court. *See* Pet. Br. at 19 n.18. Petitioners rest on the notion that respondents' failure to appeal that portion of the court of appeals' decision which held that the Airport was improperly allocating the costs of crash, fire and rescue services (CFR), now prevents them from raising the private right of action issue because it "was a necessary predicate to [the court of appeals'] holding on the CFR issue." *Id.*

A respondent, however, can "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979), so long as doing so "will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984). No cross-petition is required to do so. *Id.*; *see also Dayton Board of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977).

Because respondents raised the private right of action issue below, *see* J.A. 18-19, and do not seek to disturb the court of appeals' holding on the CFR issue, *see* Respondents' Reply in Support of Motion of United States for Leave to Participate in Oral Argument at 3, a ruling on the right of action issue will not result in the expansion of the relief granted by the court of appeals. Accordingly, respondents can raise in this Court the threshold question of whether petitioners have a private right of action under the AHTA.

federal courts, under the auspices of the AHTA, as the rent control boards for the nation's airports. This is for two reasons.

First, the AHTA's text, structure, and legislative history clearly demonstrate that, in enacting § 1513, Congress did not intend to provide a private right of action to challenge the reasonableness of airport user fees. Second, even if the Court disagrees with *amici's* analysis of the AHTA's purpose, the most that petitioners can argue is that the AHTA is ambiguous on this issue. To imply a private right of action against the state and local governmental entities which operate airports in the face of this ambiguity—as both the court of appeals did below, *see* J.A. 18-19, and the Seventh Circuit did in *Indianapolis Airport v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984)—ignores the principles of federalism which must guide the federal courts in their construction of even those congressional enactments which concern interstate commerce. *See, e.g., Gregory v. Ashcroft*, 111 S.Ct. 2395, 2401 (1991).

A. The Text, Structure And Legislative History Demonstrate That The AHTA Does Not Provide A Private Right Of Action To Challenge The Reasonableness Of Airport User Fees And Rental Charges

1. Statutory construction begins with the “strong presumption that Congress expresses its intent through the language it chooses.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). However, “[i]n determining the meaning of [a] statute, [the court must] look not only to the particular statutory language, but [also] to the design of the statute as a whole and to its object and policy.” *Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

Enacted by Congress in response to this Court's decision in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which upheld against a commerce clause challenge an airport charge on each enplaning passenger, the AHTA provides in relevant part:

(a) Prohibition; exemption

No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom;

(b) Permissible State taxes and fees

[N]othing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 U.S.C. App. § 1513. As the language and structure of the AHTA demonstrate, subsection (a) is a limited pre-emption provision, setting forth those taxes and fees which are prohibited because they are either direct or indirect head taxes. Contrary to petitioners' contention, subsection (b) does not, on its own, set forth any other prohibited taxes or fees, but rather merely makes clear that the States, their subdivisions, and the nation's airports, could continue to charge those taxes and fees which are not head taxes or their equivalents. As the Court stated in *Aloha Airlines, Inc. v. Director of Taxation of Haw.*, 464 U.S. 7, 12 n.6 (1983), “[s]ection 1513(a) pre-empts a limited number of state taxes § 1513(b) clarifies Congress' view that the States are still free to impose on airlines and air carriers ‘taxes other than those enumerated in subsection (a).’”

Ignoring the AHTA's text and structure, petitioners assert that it “prohibits all ‘unreasonable’ user fees on aircraft operators,” Pet. Br. 21, and that “the *Evansville* standard should serve as the baseline against which to

measure the 'reasonableness' of fees under § 1513(b)." *Id.* at 22. As an initial matter, *amici* note that petitioners' construction is flatly contradicted by the text of subsection (a), which does not contain "unreasonable" user fees" in its enumeration of prohibited taxes and fees. If, as petitioners assert, Congress had intended for the AHTA's prohibition of head taxes to extend to "all 'unreasonable' user fees on aircraft operators," Pet. Br. 21, then it could have easily inserted such language into subsection (a)'s enumeration of prohibited taxes and fees.

Nor does the text of subsection (b) provide any support to petitioners. In its ordinary meaning, the text of subsection (b)—"nothing shall prohibit a State . . . owning or operating an airport authority from levying or collecting reasonable rental charges"—embodies an affirmation of state authority and not a further restriction of it. To read subsection (b)'s affirmation of state authority as "prohibit[ing] all 'unreasonable' user fees on aircraft operators," Pet. Br. 21, simply defies the ordinary meaning of the statutory language.

It is also illogical, as a structural matter, to read § 1513(b) as authorizing judicial challenges to airport user fees and rental charges. As its heading states, § 1513(b) sets forth "[p]ermissible [s]tate taxes and fees," 49 U.S.C. App. § 1513(b); it does not, unlike § 1513(a), set forth a "[p]rohibition" of state taxes or fees. Accordingly, if, in enacting the AHTA, Congress had intended to prohibit unreasonable user fees and rental charges, the natural place to have done so would have been in subsection (a) and not subsection (b). Congress's failure to include "unreasonable" user fees," or other charges not calculated directly or indirectly on a per passenger basis, within the prohibition of subsection (a) thus demonstrates that its purpose in enacting the AHTA was confined to prohibiting direct or indirect head taxes.

Petitioners' reliance on the insertion of the word "reasonable" into subsection (b)'s clause pertaining to "rental

charges, landing fees, and other service charges" to imply a private right of action ignores the comprehensive background of aviation law against which the AHTA was enacted. An analysis of the federal aviation laws demonstrates that Congress's purpose in inserting the word "reasonable" into subsection (b)'s clause pertaining to rental charges and landing fees was to reconcile the AHTA with Section 18 of the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 18, 84 Stat. 219, 229 (1970) (codified as amended at 49 U.S.C. App. § 2210). Indeed, to view the congressional purpose in enacting the AHTA as authorizing federal court intervention in this area runs counter to the spirit of cooperative federalism which has long animated efforts to improve the nation's airports.

Beginning with the Federal Airport Act, ch. 251, Pub. L. No. 79-377, 60 Stat. 170 (1946), the development of the nation's airports has been marked by a partnership between the federal government, the States, and their subdivisions. Accordingly, in formulating the National Airport Plan, Congress directed the Administrator to "consult, and give consideration to the views and recommendations of . . . the States . . . and their political subdivisions." *Id.* § 3, 60 Stat. at 171. Congress further authorized the Administrator "to make grants of funds to sponsors [i.e., the States and their subdivisions] for airport development." *Id.* § 4, 60 Stat. at 172. In § 11 of the Act, Congress provided, however, that "[a]s a condition precedent to [the] approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that . . . the airport to which the project relates will be available for public use on *fair and reasonable terms* and without unjust discrimination." *Id.* § 11, 60 Stat. at 176 (emphasis added).

In 1970, when Congress determined that existing efforts to develop the nation's airports were inadequate, it enacted the Airport and Airway Development Act of 1970 (AADA), Pub. L. No. 91-258, 84 Stat. 219 (1970).

The AADA re-enacted the project sponsorship condition of § 11(1) of the 1946 Act with only minor modification. *See id.* 18(1), 84 Stat. at 229 (now codified as amended at 49 U.S.C. App. § 2210(a)(1)).

Viewed against this background, it is clear that Congress did not insert the term "reasonable" into the AHTA in order to provide a cause of action to challenge unreasonable user fees. Rather, the term was inserted to reconcile the AHTA with the language of the project sponsorship conditions of section 18(1) of the AADA. *Cf.* 15 Op. Off. Legal Counsel 31, 42 n.16 (1991) (noting comparability of language in § 1513(b) and 49 U.S.C. App. § 2210(a)(1)). Without the insertion of the term "reasonable," § 1513(b)'s clause covering user fees could well have been read as superseding the project sponsorship condition that an airport "be available for public use on fair and reasonable terms." AADA § 18(1), 84 Stat. at 229.³ To attribute to Congress, as petitioners do, the

³ While the AHTA does not expressly provide for judicial or administrative enforcement of its provisions, provisions of the Federal Aviation Act in force at the time of its enactment established an administrative enforcement scheme. Under current law, the Secretary is specifically granted the power to enforce the AHTA by 49 U.S.C. App. § 1354(a). Moreover, "any person may file with the Secretary . . . a complaint in writing with respect to" a violation of the AHTA. 49 U.S.C. App. § 1482(a). The Secretary may also "at any time . . . institute an investigation, on [his] own initiative . . . relating to the enforcement" of the AHTA. 49 U.S.C. App. § 1482(b). The Secretary's orders are subject to judicial review in the courts of appeals. 49 U.S.C. App. § 1486. Finally, in the event of a violation of the AHTA, the Secretary is authorized to seek injunctive relief in the district court. 49 U.S.C. App. § 1487(a); *see generally* 14 C.F.R. pt. 13.

Of note, in § 1487 Congress specifically authorized "any party in interest" to seek injunctive relief for violations of 49 U.S.C. App. § 1371(a), which requires that air carriers obtain a certificate of public convenience and necessity. That Congress authorized parties other than the Secretary to bring suit for injunctive relief in this limited circumstance provides additional evidence that Congress, in enacting the AHTA, did not intend to provide a private right of action. *Cf. Touche Ross & Co. v. Redington*, 442 U.S. 560,

purpose of authorizing a judicial challenge to airport user fees based on the single word—"reasonable"—requires too strained and hypertechnical a reading of the statute. *See, e.g., Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25-26 (1988).⁴

2. The legislative history of the AHTA provides further support for this view. As the Senate Report indicates, the AHTA was enacted to overrule this Court's decision in *Evansville*, which upheld an airport charge on each enplaning passenger against a commerce clause challenge. *See S. Rep. No. 12*, 93d Cong., 1st Sess. 17 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1434, 1446. In the Commerce Committee's view, head taxes were "particularly annoying," *id.* at 17, 1973 U.S.C.C.A.N. at 1450, as they caused "confusion, delay, anger and resentment" as ticket agents attempted to collect the tax from passengers. *Id.* at 21, 1973 U.S.C.C.A.N. at 1446. Moreover, because in enacting the AADA of 1970 Congress had imposed an eight percent tax on the price of all domestic tickets, the Committee viewed state and local head taxes as "constitut[ing] an inequitable, double burden of taxation on passengers." 1973 U.S.C.C.A.N. at 1450. The Senate Report further noted that in many instances, the revenues generated through state and local head taxes were not being earmarked for airport development, but

572 (1979). Indeed, as the First Circuit recognized in the context of the AAIA, judicial intervention under the auspices of the AHTA would undermine the Secretary's authority and the uniformity of federal law by allowing for "potentially conflicting decisions between the judicial and administrative forums." *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 169 (1st Cir. 1989).

⁴ As Judge Learned Hand stated:

Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used

NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941) (*quoted in Shell Oil*, 488 U.S. at 25 n.6).

rather were being used to support local governments. *See id.* at 17, 22, 1973 U.S.C.C.A.N. at 1446, 1451.

The Senate Report, however, expressed no reservation about the rental charges and user fees being assessed by the nation's airports. *See generally id.* at 17-26, 1973 U.S.C.C.A.N. at 1446-55.⁵ Indeed, the congressional concerns prompted by the imposition of head taxes are inapplicable to airport user fees and rental charges. Such fees are not collected from passengers and thus do not delay the arrival and departure of flights nor engender "anger and resentment" on the part of passengers. *Id.* at 17, 1973 U.S.C.C.A.N. at 1446. Nor do user fees and rental charges constitute a "double burden of taxation." *Id.* at 21, 1973 U.S.C.C.A.N. at 1450. Rather, such fees are collected only for services provided by the airport. And finally, because federal law generally prohibits the nation's airports from remitting surplus funds to the States and their subdivisions, *see* 49 U.S.C. App. § 2210(a)(12), airport user fees cannot be used as a general revenue source for the States and local governments. Accordingly, none of the concerns which led to Congress's prohibition of head taxes could conceivably have led it to regulate airport user fees and rental charges as well. The Senate Report thus demonstrates that Congress's purpose in enacting the AHTA was to prohibit direct and indirect head taxes and not "unreasonable" user fees and rental charges.

The Conference Report confirms this view. As the Conference Report stated, the Senate bill (which was enacted with amendments not relevant here) "provided for a permanent prohibition against the levy or collection of a tax or other charge on persons traveling in air commerce, or on the carriage of persons so traveling, or on the sale of

⁵ *See also Wardair Canada Inc. v. Florida Dept. of Rev.*, 477 U.S. 1, 16 (1986) (Burger, C.J., concurring) (noting complaints of States that earliest version of Senate bill would prohibit even "unobjectionable" charges such as landing fees, and the assurances of members of Congress in response that the bill would be clarified to reflect that the prohibition was to apply "only to 'head taxes' and the like").

air transportation or on the gross receipts derived therefrom." H.R. Conf. Rep. No. 225, 93d Cong., 1st Sess. at 5, reprinted in 1973 U.S.C.C.A.N. at 1458. This report also noted that "the prohibition would not extend to . . . the levy or collection of other charges . . ." *Id.* at 6, 1973 U.S.C.C.A.N. at 1458. Like the Senate Report, the Conference Report manifests the limited purpose of the AHTA—to prohibit direct and indirect taxes apportioned on a per passenger basis. Neither report provides any support for petitioners' broad assertion that "[t]he AHTA outlawed all direct or indirect state and local fees on air travel except certain fees specifically exempted. . . ." Pet. Br. 13.

3. Relying on the legislative history, petitioners contend that in enacting the AHTA, "Congress intended for [user] fees to be measured by and to pass the *Evansville* standard." *Id.* at 21. Petitioners' position is logically flawed and contradicted by the legislative history.

As the Senate Report noted, Congress criticized the *Evansville* decision for "not provid[ing] adequate safeguards to prevent undue or discriminatory taxation." S. Rep. at 17, 1973 U.S.C.C.A.N. at 1446. After discussing the head taxes upheld in *Evansville*, the report continued:

The Court, in essence, ruled that states and cities could constitutionally impose a reasonable charge on interstate and intrastate air passengers in order to underwrite airport operational and development costs. Yet, the decision did not sufficiently define the ruling as, for example, what constitutes a reasonable charge, or just how far a state or municipality could go in levying head taxes. Obviously, the decision raised more questions than it answered, and the result was predictable.

Id.

Not only does this passage's specific references to "charge[s] on . . . air passengers" and to "head taxes" provide further support for the view that the AHTA pro-

hibits only head taxes and not "‘unreasonable’ user fees," Pet. Br. 21, the nature of Congress's criticism firmly repudiates petitioners' view. Having criticized the *Evansville* standard—a standard which, in large part, rests on balancing the amount of the fee imposed against the benefit provided or the cost incurred by the taxing authority, see 405 U.S. at 717-720—because it did not adequately define "what constitutes a reasonable charge," S. Rep. at 17, 1973 U.S.C.C.A.N. at 1446, Congress hardly could have intended to subject user fees and rental charges to the same ad hoc balancing. Rather, Congress's criticism of *Evansville* strongly suggests that, in enacting the AHTA, Congress intended to adopt a categorical rule prohibiting head taxes. Adopting a categorical prohibition is entirely consistent with Congress's concern that *Evansville* did "not provide adequate safeguards to prevent undue or discriminatory taxation." *Id.* By flatly prohibiting the imposition of certain taxes—as it did in § 1513(a)—Congress addressed its concern with the adequacy of the *Evansville* standard and the competence of the judiciary to fashion a proper standard. It stretches credulity to suggest, as petitioners do, that Congress nonetheless intended for the very standard it found inadequate to be used for challenging airport rental charges and user fees.

B. The Court of Appeals' Implication Of A Private Right Of Action Ignores The Federalism Principles Which Inform The Construction Of Ambiguous Statutes Affecting State Interests

Amici submit that the AHTA's text, structure, and legislative history clearly demonstrate that it does not provide a private right of action to challenge the reasonableness of airport user fees and rental charges. To the extent the Court may disagree, *amici* submit that the most petitioners can argue is that the AHTA is ambiguous or silent on this issue. This ambiguity precludes the implication of a private right of action against a State or its subdivisions under the doctrine articulated in *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991), and many other cases.

The court of appeals, however, relied on this Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), to conclude that under the AHTA, the airlines have an implied private right of action to challenge airport user fees and rental charges. See J.A. 18-20. In so concluding, the court of appeals reasoned that "the intent of Congress to grant a private right of action seems inherent in the language of the statute The AHTA expressly prohibits states from levying 'a tax, fee, head charge, or other charge directly or indirectly'" *Id.* at 19 (quoting 49 U.S.C. § 1513(a)) (ellipsis in original). Whatever the validity of the court of appeals' reasoning with respect to head taxes and their equivalents—an issue which is not present in this case—*amici* submit that the court of appeals' implication of a private right of action to challenge airport user fees and rental charges reflects a fundamental misunderstanding of the principles of federalism which this Court has articulated to guide the lower federal courts in their construction of ambiguous statutes affecting state interests.

As an initial matter, this case, unlike *Cort*, involves the application of a federal statute to a suit involving a political subdivision of a State⁶ and not to a suit between private parties. See 422 U.S. at 70-71. The Court has, of course, recognized that the States and their subdivisions "retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 111 S.Ct. at 2401; see also *New York v. United States*, 112 S.Ct. 2408 (1992) (recognizing a core component of state sovereignty beyond the scope of congressional power). In a variety of contexts implicating the interests of the States, the Court has thus declined to attribute "state-displacing weight [to] federal law" in the face of "mere congressional ambiguity." Laurence Tribe, *American Constitutional Law* § 6-25 at 480 (2d ed. 1988), quoted in *Gregory*, 111 S.Ct. at 2403.

⁶ In some States, airports are operated by arms of the State. See, e.g., R.I. Gen. Laws §§ 1-2-1 et seq.

Accordingly, it is "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). As the Court explained in *Will*, this rule applies regardless of the power under which Congress has acted.

Atascadero was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or if it intends to impose a condition on the grant of federal moneys, *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 16 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Will, 491 U.S. at 65. And as the Court noted in *Gregory*, the plain statement rule is especially important in light of the Court's holding in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), that "left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers." 111 S.Ct. at 2403.

Disregarding these principles of statutory construction, the court of appeals erred in holding that, under the AHTA, the airlines have an implied private right of action to challenge airport user fees and rental charges. To interject the federal courts in disputes over the reasonableness of the user fees and rental charges assessed by the scores of airports operated by the States and their sub-

divisions—particularly in the absence of meaningful standards to guide their decisions—would clearly "alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory*, 111 S.Ct. at 2401 (quoting *Will*, 491 U.S. at 65 (quoting *Atascadero*, 473 U.S. at 242)).⁷ And to imply a private right of action to challenge airport user fees and rental charges under the AHTA is fundamentally erroneous in light of Congress's failure to provide a plain statement to that effect.

The AHTA does not, by its express terms, provide for judicial enforcement of its provisions. *See generally* 49 U.S.C. App. § 1513. And even if § 1513(a)'s language stating that "[n]o State . . . shall levy or collect" the enumerated prohibited taxes is a sufficiently clear statement of Congress's intent to subject the States and their local government subdivisions to suit (as opposed to the Secretary's administrative enforcement regime), petitioners cannot avail themselves of this provision. As discussed above, § 1513(a) does not include unreasonable

⁷ To be sure, the AAIA reflects a substantial federal involvement in the area of airport finances. *Amici* submit, however, that with respect to the precise issue of airport user fees and rental charges, the federal interest arises only because the States and their subdivisions have, as a condition of receiving federal funds, "voluntarily and knowingly accept[ed] the terms of [a] contract," *Pennhurst*, 451 U.S. at 17 (internal quotation omitted), which requires them to make the airport "available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. § 2210 (a) (1). As part of the terms of this contract, the States and their subdivisions have also agreed to the Secretary's oversight of their user fees and rental charges. The AAIA scheme makes clear, however, that if a State (or its subdivision) declines to accept federal funding, its user fees and rental charges are not subject to federal oversight by either the Secretary or the courts.

Whether or not an airport authority has accepted federal funding under the AAIA, to construe the AHTA as providing a private right of action to directly challenge airport user fees and rental charges would "alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory*, 111 S.Ct. at 2401 (quoting *Will*, 491 U.S. at 65 (quoting *Atascadero*, 473 U.S. at 242)).

rental charges and user fees in its enumeration of prohibited taxes. See 49 U.S.C. App. § 1513(a). Petitioners' right of action must therefore stem from § 1513(b).

Section 1513(b)'s language is not, however, a clear statement of Congress's intent to subject the States and their subdivisions to suits challenging airport user fees. Section 1513(b)'s language that "*nothing in this section shall prohibit a State . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges,*" 49 U.S.C. App. § 1513(b) (emphasis added), does not, by its express terms, prohibit unreasonable user fees. Rather, § 1513(b) merely reaffirms the power of the States and their subdivisions to continue to levy those charges and fees which do not constitute head taxes. Cf. *Aloha Airlines*, 464 U.S. at 12 n.6. ("§ 1513(b) clarifies Congress' view that the States are still free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a).'"). To the extent that § 1513(b)'s affirmation of airport authorities' power to collect "reasonable rental charges" can be said to imply a correlative limitation on their power to charge "unreasonable" fees—a notion which, as discussed above, is firmly contradicted by the text of § 1513(a)—it nonetheless falls far short of the "'unmistakably clear'" statement required to "'alter the 'usual constitutional balance between the States and the Federal Government.''" *Gregory*, 111 S.Ct. at 2401 (quoting *Will*, 491 U.S. at 65 (quoting *Atascadero*, 473 U.S. at 242)).⁸ Because the court of appeals ignored this

⁸ *Amici* also note that to the extent the AHTA is ambiguous on this issue, petitioners' contention that it prohibits "all 'unreasonable' user fees," Pet. Br. 21, and the court of appeals' holding that "[t]he AHTA prohibits the imposition of any fee on 'persons traveling in air commerce or on the carriage of persons traveling in air commerce' which are (sic) unreasonable," J.A. at 22 (quoting 48 U.S.C. App. § 1513(a)), conflict with the Secretary's reasoned construction of the AHTA. In *Investigation Into Massport's Landing Fees*, FAA Docket 13-88-2 (Dec. 22, 1988), *aff'd New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157

Court's requirement that Congress provide a plain and unambiguous statement of its intent to subject the States and their subdivisions to suits challenging airport user fees, it erred in holding that the AHTA provides a private right of action to challenge airport user fees and rental charges.⁹

(1st Cir. 1989), the Secretary rejected such a broad reading of the AHTA.

In *Massport*, the Secretary ruled that the airport's landing fee structure, which was assessed by adding a flat fee per landing regardless of aircraft size and a fee based on aircraft weight, thereby increasing the landing fees for small aircraft while decreasing the fees for large aircraft, *id.* at 3, violated the grant assurance that the "airport . . . be available for public use on fair and reasonable terms and without unjust discrimination." See 49 U.S.C. App. § 2210(a); *Massport Opinion and Order* at 9. The Secretary, however, also ruled that because the "fee formula does not appear to be in form or substance a head tax or its equivalent, Massport's fees do not violate the Anti-Head Tax Act." *Massport Opinion and Order* at 11. The Secretary's interpretation of the AHTA—that even unreasonable landing fees do not violate the AHTA unless they are "in form or substance a head tax or its equivalent," *id.*, is a reasonable interpretation of the statute to which the court of appeals was required to defer. See, e.g., *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

⁹ Because respondents are not arms of the State of Michigan, this suit does not implicate the Eleventh Amendment. See *Lincoln County v. Luning*, 133 U.S. 529 (1890). Nonetheless, if the AHTA provides a private right of action to challenge airport user fees, claims (such as petitioners') seeking the cross-crediting of airport concession revenues to reduce landing fees and terminal rent would clearly implicate the Eleventh Amendment where the airport authority is an arm of a State. The AHTA does not, however, provide a clear statement of congressional intent to abrogate a State's Eleventh Amendment immunity with respect to rental charges and landing fees. See *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (quoting *Atascadero*, 473 U.S. at 242). It would be illogical to hold that the AHTA's language was nonetheless sufficiently clear so as to imply a private right of action against the political subdivisions of the State.